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WILCOX & CO

No. 8428

Vol 2049

United States Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY and DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellant,

vs.

THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR and INDUSTRY THEREOF, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of CHATTERTON and SON, a corporation, at Billings,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

Parker Printing Co., 545 Sansome Street, San Francisco

No. 8428

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Bill of Exceptions—(Continued):

Bill of Exceptions—(Continued):

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

MESSRS. WEIR, CLIFT & BENNETT,
Helena, Montana.
Attorneys for Defendant and Appellant.

MR. ENOR K. MATSON,
Attorney General of the State of Montana,
Helena, Montana,

MR. R. G. WIGGENHORN,
Billings, Montana.
Attorneys for Plaintiffs and Appellees. [1]*

* Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

LAW ACTION Number 917.

The STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY THEREOF, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of CHATTERTON & SON, a corporation, at Billings, Montana,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Defendant.

BE IT REMEMBERED, that on June 9th, 1932, TRANSCRIPT ON REMOVAL of this cause from the State Court was duly filed herein, the Complaint contained in said transcript being in the words and figures following, to wit: [2]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

No. 15977

THE STATE OF MONTANA, and the DEPARTMENT OF AGRICULTURE OF THE STATE OF MONTANA, for the use and benefit of the holders of warehouse receipts in the

public warehouse seed grain elevator of Chatterton & Son, a corporation,

Plaintiff

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation

Defendant.

COMPLAINT

The plaintiff complains and alleges:

1.

That Chatterton & Son is now and at all times herein mentioned was a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Michigan, and during all times herein mentioned was operating a public warehouse for storing beans at Billings, in the State of Montana, and at all times held itself out to the public as receiving beans for storage, and during all of such time held itself out to the public as a duly licensed and bonded corporation and warehouse under the laws of Montana and operating as such.

2.

That the defendant Fidelity and Deposit Company of Maryland is now and at all times herein mentioned was a foreign corporation organized and existing under and by virtue of the laws of the State of Maryland for the purpose of acting as surety on bonds, including the bonds of public

warehousemen of [3] the class herein mentioned, and during all the times herein mentioned was and now is conducting such business in the State of Montana.

3.

That on or about the 7th day of January, 1930, in consideration of the premium paid to defendant in the sum of One Hundred Dollars ($100.00), upon the order and request of said Chatterton & Son defendant, as surety made and executed its certain bond and instrument in writing, with the said Chatterton & Son as principal, to the State of Montana, in the sum of Ten Thousand Dollars ($10,000.00), conditioned that said Chatterton & Son indemnify the owners of beans stored in said warehouse at Billings, Montana, against loss and faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture in relation to the business of public warehouseman; a true and correct copy of which said bond is hereto attached marked "Exhibit A" made a part hereof and hereby referred to for further particulars.

4.

That on or about the 15th day of January, 1930, said bond, after being so executed, was by defendant duly delivered to the agent and manager of said Chatterton & Son at Billings, Montana, and

the person in charge of said warehouse, with directions to him that said bond be delivered and filed with the Secretary of State of the State of Montana.

5.

That at the time of said execution and delivery of said bond, defendant was fully informed as to the exact nature and kind of warehouse and business being conducted by said Chatterton & Son at Billings, Montana, and executed and delivered [4] said bond in consideration thereof, and for the purpose of satisfying the requirements and demands of the Commissioner of Agriculture of the State of Montana, and so as to qualify the said Chatterton & Son in the State of Montana to conduct said warehouse at Billings, Montana.

6.

That subsequently thereto and prior to the first day of July, 1930, the defendant Fidelity and Deposit Company of Maryland made, executed and delivered its renewal certificate of said bonds in words and figures as set forth in "Exhibit B" hereunto attached and hereby made a part hereof, whereby the said bond was continued in force and effective to the first day of July, 1931.

7.

That on or before the first day of July, 1930 the said renewal certificate (Exhibit B) was mailed to the Commissioner of Agriculture of the State of

Montana, but addressed to Billings, Montana; that said renewal certificate at a later date was returned to defendant Fidelity and Deposit Company of Maryland, and later mailed to the agent and person in charge of the warehouse of Chatterton & Son at Billings, Montana, and said renewal certificate by its terms continued said bond in force for the year of July 1, 1930 to July 1, 1931.

8.

That the defendant Fidelity and Deposit Company of Maryland received from Chatterton & Son the sum of $100.00 premium for the issuance and delivery of said renewal certificate.

9.

That in the month of May, 1931 the defendant Chatterton & Son having said bond and the renewal thereof in its possession at the request of the Commissioner of Agriculture of the State [5] of Montana delivered said bond and the renewal thereof to the State of Montana for the purpose of having the same filed and recorded in accordance with law and said bond and renewal certificate were so filed.

10.

That at all times between the first day of January, 1930 and the first day of July, 1931, the said Chatterton & Son, with the knowledge of the defendant, held itself out and represented to the growers and owners of beans in the territory in and about Billings, Montana, and particularly those hereinafter

named and referred to, that said warehouse of said Chatterton & Son at Billings, Montana was a duly licensed and bonded warehouse and that said Chatterton & Son was duly licensed and bonded to conduct such warehouse at Billings, Montana, and the persons hereinafter named and referred to acted and relied on said representations and at the time as hereinafter stated and set forth deposited their respective beans in the said warehouse for storage only, each receiving from said Chatterton & Son the customary warehouse receipts for such storage. That a total of over fifty thousand bags of beans of one hundred pounds each were thus stored in the said warehouse during the period from July 1, 1930 to June 30, 1931, all of which were so stored in full reliance on said representations as aforesaid and not otherwise.

11.

That notwithstanding the duty of said Chatterton & Son to preserve the identity of each of said lots of beans so stored so as to permit the delivery to each owner of the identical beans so stored by him, as required by law and by the terms of the said warehouse receipts so issued, the said Chatterton & Son wrongfully and unlawfully commingled all of said beans indiscriminately in its said warehouse and lost the identity of said beans, and during the period from July 1, 1930 to June 30, [6] 1931, said Chatterton & Son wrongfully removed all of said beans from the said warehouse and from the State of Montana and sold and delivered

them and shipped them out of the state, without accounting to the owners of said beans and converted the said beans to their own use. That each and all of such shipments, sales and conversions were without the knowledge or consent of the owners of said beans and holders of warehouse receipts for the same, respectively, and without the knowledge or consent of the Commissioner of Agriculture of the State of Montana.

12.

That upon discovery of said defalcation, shortly after July 1, 1931, demand was duly made upon said Chatterton & Son by the respective holders of warehouse receipts as aforesaid, and on their behalf by the said Commissioner of Agriculture of the State of Montana for the said respective lots of stored beans or the value thereof or the proceeds on the sale and disposition therefor, tendering the warehouse receipts therefor and offering to pay all advances, storage and all other legal charges against said beans, but that the said Chatterton & Son has wholly refused and failed to redeliver any of said beans and has been unable to do so, and has wholly failed to pay for the same except that it has turned over and paid to the said Commissioner of Agriculture of the State of Montana, in property or money, the equivalent of not to exceed $25,000.00, which is the only satisfaction which the owners of beans and of said warehouse receipts have had.

13.

That precisely there were so stored and converted by said Chatterton & Son, during said period while said bond was effective by residents of Montana, a total in excess of 39,897 bags of Montana-grown beans, and the aggregate net value of said beans, at the times of the respective conversions, after crediting against the same all advances made and all proper charges and deductions [7] for storage, cleaning, handling and other charges, was the sum of $65,843.57, and the consequent loss to the owners of said beans, after crediting the total amount so recovered as aforesaid is in excess of the sum of $40,000.00.

14.

That there is attached hereto, marked "Exhibit C" and hereby referred to as a part hereof, a correct list and schedule showing the names of the Montana residents who stored said beans and held said warehouse receipts for beans grown in Montana, showing in each instance the quantity of beans stored, their grade, the date of shipment and conversion, the market value at time of conversion, the advances and charges against them and the net balance due in each case. That this action is brought for the benefit of all of the said Montana owners and holders of warehouse receipts as aforesaid, and is brought by the State of Montana at their special instance and request and at the request of each of them to the Attorney General of Montana.

15.

That the Department of Agriculture of Montana in the month of June, 1931 received notice of the insolvency of Chatterton & Son and of its inability to meet in full its storage and intervened in the interest of holders of warehouse receipts as above described and duly made demand on the defendant for payment of said bond which payment defendant refused and still refuses and the Department of Agriculture duly requested the Attorney General of Montana to bring the necessary action to collect payment on said bond.

16.

That on or about the 6th day of December, 1930 Chatterton & Son pretended to transfer the business above described to Chatterton & Son, Incorporated, a foreign corporation, which then was and still is duly organized and existing under the laws of the State of Kansas and which was a subsidiary corporation wholly owned by said Chatterton & Son, and which corporation assumed all [8] the outstanding bean storage obligations of Chatterton & Son, and defendant in writing authorized the necessary change in name of the principal to Chatterton & Son, Incorporated, and the defendant in writing on or about said date notified the Department of Agriculture of Montana and Chatterton & Son and Chatterton & Son, Incorporated. That, however, at all times thereafter the said two corporations were indistinguishable and

their identities and functions were not disclosed to the public and were separated by said two companies only as a matter of private accounting and convenience between them. That none of the owners of said beans and holders of said warehouse receipts aforesaid were notified of any such transfer of interest and none of them had any knowledge of the organization or existence of said Chatterton & Son, Incorporated, and all of the acts of conversion aforesaid were done and performed by both of said companies jointly and indiscriminately, none of the owners of said beans or holders of said warehouse receipts having consented to said transfer of interest and none of them having discharged the said Chatterton & Son.

WHEREFORE, Plaintiff demands judgment against defendant for the sum of $20,000.00 and for its costs and disbursements herein, for the use and benefit of the holders of warehouse receipts in the seed grain elevator of Chatterton & Son, a corporation and Chatterton & Son, Incorporated.

L. A. FOOT
Attorney General
T. H. MacDONALD
Assistant Attorney General

BROWN, WIGGENHORN & DAVIS,
Attorneys for Plaintiff. [9]

State of Montana
County of Lewis and Clark.—ss.

L. A. Foot first being duly sworn says: That he is Attorney General of the State of Montana and makes this verification as such on behalf of the State of Montana; that he has read the foregoing Complaint and knows the contents thereof and that the same is true according to his knowledge, information and belief.

L. A. FOOT
Attorney General

Subscribed and sworn to before me this 29th day of April, 1932.

[Seal] HELENA C. STELLWAY
Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires April 1, 1935.

Service of the within Summons and Complaint and receipt of copy acknowledged this 12th day of May, 1932, at 2:35 o'clock p.m.

GEO. P. PORTER,
State Auditor and Commissioner of Insurance.
By C. M. McCoy.
M.Mc.
Deputy Commissioner of Insurance.

Filed May 11, 1932, 10 a.m. Geo. H. Hays, Clerk of District Court; by A. W. Stow, deputy.

[Endorsed]: Filed June 9, 1932 [10]

EXHIBIT A

STATE OF MONTANA

Public Warehouseman's Bond

Bond #3591931

KNOW ALL MEN BY THESE PRESENTS: That Chatterton & Son a corporation, organized and existing under and by virtue of the laws of the State of Michigan as principal and Fidelity and Deposit Company of Maryland a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business within the State of Montana, as surety, are held and firmly bound unto the State of Montana, for the benefit of all parties concerned in the penal sum of $10,000.00 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our successors and assigns, forever, jointly, severally, firmly by these presents. Sealed with our seals and dated this 7th day of January A.D. 1930.

THE CONDITION OF THIS OBLIGATION IS SUCH,

That whereas the above bounden Chatterton & Son being the lessee of a public local warehouses located at Billings in the State of Montana, and owned, controlled or operated by the said Chatterton & Son has applied to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry of the State of

Montana for a license or licenses to open, conduct and carry on the business of public warehousemen in the State of Montana, for the period beginning Jan. 1, 1930, and ending July 1, 1930, in accordance with the laws of the State of Montana;

PROVIDED, That this obligation shall apply also to any and all other stations in the State of Montana at which the business of Public Warehousemen may be conducted by the said principal during the period for which it shall remain in force and effect.

NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relation to the business of Public Warehouseman, then this obligation to be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, The above named principal and the above named surety, by and through each of their duly authorized officers, have caused these presents to be executed and their and

each of their corporate seals affixed hereto on this 7th day of January A. D. 1930.

Approved by: W. H. MOORE

[Seal] CHATTERTON & SON
Principal.
V. A. STICKLE
Vice-President.

[Seal] J. H. CALKINS
Asst. Secretary.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Surety.

Approved: W. H. MOORE

By PAUL L. WELLIVER
Vice President
ROBERT HOWELL,
Assist. Secretary [11]

EXHIBIT B

No. 5809 Premium $100.00

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Baltimore.

CONTINUATION CERTIFICATE.

For Miscellaneous Term Bonds, Contract Department.

Chatterton and Son, Lansing, Michigan as Principal, and the Fidelity and Deposit Company of Maryland, as Surety, in a certain Bond No. 3,591,-931, dated the 7th day of January, 1930, in the penalty of Ten Thousand Dollars ($10,000) in favor of State of Montana, do hereby continue said bond in force for the further term of one year beginning on the first day of July, 1930.

PROVIDED, however, that said bond, as continued hereby, shall be subject to all its terms and conditions, except as herein modified, and that the liability of the said Fidelity and Deposit Company of Maryland under said bond and any and all continuations thereof shall in no event exceed in the aggregate the above named penalty, and that this certificate shall not be valid unless signed by said Principal.

Signed, sealed and dated this tenth day of July, 1930.

[Seal] CHATTERTON & SON
Principal
By A. H. MADEN,
Secretary
By H. E. CHATTERTON
Principal

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By FRED S. AXTEN,
Vice-President

Witness:
MARGARET D. LASENBY
J. H. CALKINS

Attest:
W. H. MOORE, Assistant Secretary

Form and execution—W. H. MOORE. [12]

EXHIBIT C.

REPORT ON CHATTERTON & SON STORAGE BEANS

		No. Sax	Grade	Date of Shipt. to K. C.	Net Weight	Mkt. value time of shipt.	Total net value after H. P. deduction	Cash Advances	Misc. Charges Seed, Taxes, etc.	Balance due at time of Conversion
Winifred Annin	Columbus	22	96	10/13/30	2,200	4.00	88.00	55.00		33.00
Bert Appleby	Billings	199	96	2/ 5/31	19,900	2.50	498.50			497.50
Buxton & Appleby	Billings	143	98	12/ 1/30	14,300	3.50	500.50			500.50
E. S. Blodgett	Billings	168	96	10/29/30	16,800	3.75	630.00	400.00	137.50	92.50
Jake Benner	Park City	320	95	11/14/30	30,400	3.75	980.00	650.00	4.85	325.15
Lulu Boyd	Boyd	101	96	11/13/30	10,100	3.50	353.50	252.50		101.00
Bert Bowman	Billings	95	96	7/13/31	9,500	2.00	190.00		27.50	162.50
A. L. Baker	Billings	192	92	7/13/31	17,664	2.25	233.84		42.00	191.84
O. S. Bauman	Billings	375	94	2/11/31	35,250					
O. S. Bauman	Billings	12	88	2/11/31	1,056	2.75	759.03			759.03
Jake Becker	Ballantine	612	93	7/13/31	56,916	2.25	852.21			852.21
H. M. Black	Sheridan	536	96	5/18/31	53,600	2.25	1,206.00			1,206.00
J. R. Barnett	Billings	293	92	11/ 6/30	26,956	3.75				
J. R. Barnett	Billings	44	96	7/13/31	4,400	2.00	864.45	125.00		739.45
Wm. Benner	Park City	250	95	11/14/30	23,750	3.75				
Wm. Benner	Park City	192	96	11/17/30	19,200	2.50	1,437.62		24.50	1,413.12
A. T. Barber	Billings	141	90	1/22/31	12,690	3.00	239.70		28.00	211.70
J. L. Barker	Billings	2,109	93	7/13/31	196,137	2.25	2,936.78		193.36	2,743.43
Harry Barker	Billings	315	94	7/13/31	29,610	2.25				
Harry Barker	Billings	34	96	7/13/31	3,400	2.00	545.20			545.20
Jno. Chapman	Red Lodge	183	91	10/29/30	16,653					
Jno. Chapman	Red Lodge	267	93	10/29/30	24,831	4.00	1,307.76	1,125.00	6.15	176.61
J. W. Cole	Park City	103	97	1/28/31	10,300	2.75	283.25	154.00		129.25
Roy Covert	Billings	56	96	11/17/30	5,600	3.50	196.00			196.00
W. L. Cook	Billings	220	98	7/13/31	22,000	2.25	495.00	200.00	17.50	277.50
Chas. Daniels	Billings	419	96	7/13/31	41,900	2.00	938.00		6.75	931.25
J. B. Deavitt	Billings	183	96	11/17/30	18,200	3.50				
J. B. Deavitt	Billings	332	94	2/10/31	31,208	2.75	1,296.02	300.00	9.00	897.02
B. R. Daugherty	Belfry	180	98	10/ 6/30	18,000	4.00	720.00	450.00		270.00
J. R. Daugherty	Belfry	269	96	10/ 6/30	26,900	3.75	1,008.75	672.50		336.25
Geo. Danford	Billings	105	96	12/ 4/30	10,500	3.25	341.25	150.00		191.25
Wm. De Vries	Columbus	41	98	10/13/30	4,100	4.25	174.25		33.05	141.20
Chas. Danford	Billings	686	95	9/27/30	65,170	4.25		1,400.00		1,060.72
Chas. Danford	Billings	17	96	7/13/31	1,700	2.00	2,460.72	385.00		290.00
										[13]
M. I. Draper,	Myers	225	98	1/17/31	22,500	3.00	675.00	385.00		290.00
J. G. Epperson	Billings	557	98	10/ 8/30	55,700	4.00	2,228.00			2,228.00
B. H. Frizzel	Billings	86	88	10/17/30	7,568	4.25	218.44	160.00		58.44
Sarah Fleming	Billings	24	96	10/18/30	2,400	4.00	96.00			96.00
Fred Fritz	Billings	794	88	1/ 2/31	69,872	3.50	1,492.72	100.00		1,392.72
Sarah Gross	Laurel	207	95	10/18/30	19,665	4.00				
Sarah Gross	Laurel	14	96	7/13/31	1,400	2.00	711.10	566.25		144.82
Conrad Gabel	Billings	397	96	1/26/31	39,700	2.75	1,091.75		105.00	986.75
Jno. Giesick	Park City	178	98	12/26/30	17,800	3.50	623.00	265.00	72.65	285.35
P. Gallagher	Miles City	366	97	1/28/31	36,600	2.75	1,006.50	548.00		458.50
John Hergett	Billings	290	92	7/13/31	26,680	2.25	367.80	110.00		257.80
M. D. Hartley	Billings	41	96	2/11/31	4,100	2.50	102.50			102.50
L. S. Harrenbrack		81	96	11/14/30	8,100	3.50	283.50	160.00		123.50
Mrs. Geo. Hein	Laurel	352	94	9/29/30	33,088					
Mrs. Geo. Hein	Laurel	90	94	10/ 1/30	8,460	4.00	1,396.72	625.00		771.72
Dave Hergenreider		384	98	12/26/30	38,400	3.50	1,344.00	650.00	6.10	687.90
Leo Jahnk	Laurel	61	96	11/13/30	6,100	3.50	213.50	150.00		63.50
J. C. Kirk	Bridger	545	96	10/ 2/30	54,500	3.75	2,043.75	1,362.50		681.25
Mike Kilwine	Laurel	192	96	10/18/30	19,800	3.75	742.50	482.50	20.45	239.55
F. Kline	Billings	121	96	7/13/31	12,100	2.00	242.00		66.00	176.00
Emil Kober	Park City	444	98	11/20/30	44,400	3.50	1,554.00	750.00	8.15	795.85
Jake Kahler	Laurel	400	96	1/29/31	40,000	2.75				
Jake Kahler	Laurel	47	96	1/30/31	4,700	2.75	1,252.92		7.00	1,245.92
Jake Kahler	Laurel	17	93	7/13/31	1,581	2.25				
Levine Kober	Park City	221	98	11/17/30	22,100	3.75	3,486.00			3,486.00
Levine Kober	Park City	(1,181	98	7/13/31	118,100	2.25				
Jno. Kline	Hysham	547	96	12/ 5/30	54,700	3.25	1,777.75	1,394.50		383.25
Ed. Kater	Park City	497	96	3/ 6/31	49,700	2.25	1,118.25			1,118.25
Wm. Kober	Park City	500	98	10/13/30	50,000	4.25				
Wm. Kober	Park City	283	98	11/15/30	28,300	3.75	5,045.25	2,074.35		2,970.90
Wm. Kober	Park City	572	96	11/20/30	57,200	3.25				
R. H. Langford	Billings	375	98	9/23/30	37,500	4.50	1,687.50	937.50	52.50	697.50
G. Noble Lewis	Billings	186	92	10/13/30	17,112	4.25	578.46	400.00	42.00	136.46
G. F. Lindaner	Billings	251	98	10/29/30	25,100	4.00	1,004.00	600.00		404.00
Frank Lyle	Red Lodge	55	95	10/28/30	5,225	4.00	181.50			181.50
J. R. Lawson	Joliet	185	93	10/28/30	17,205	4.00				
J. R. Lawson	Joliet	105	96	11/13/30	10,500	3.50	926.20	848.12		78.08
										[14]

REPORT ON CHATTERTON & SON STORAGE BEANS

		No. Sax	Grade	Date of Shipt. to K. C.	Net Weight	Mkt. value time of shipt.	Total net value after H. P. deduction	Cash Advances	Misc. Charges Seed, Taxes, etc.	Balance due at time of Conversion
J. Ledbetter	Joliet	120	95	1/ 9/31	11,400	3.50	339.00	200.00		139.00
J. & H. Lawson		20	95	7/13/31	1,900	2.25	32.75	30.00		2.75
Wm. Lenz	Cartersville	505	93	1/27/31	46,965	3.00	1,055.45	324.16		731.29
Ray Larimore	Billings	405	88	12/27/30	35,640	3.50	761.40	550.00	34.48	176.92
Jno. Lamey	Billings	61	96	7/13/31	6,100	2.00	122.00			122.00
McBride Bros.	Billings	352	91	10/ 1/30	32,032	4.00	964.48	700.00	5.30	259.18
J. E. McCullock	Hardin	480	96	10/31/30	48,000	3.50	1,680.00	1,080.00	48.75	551.25
David Miller	Billings	927	93	7/13/31	86,211	2.25	1,506.37		13.35	1,493.02
C. Michel	Billings	164	96	11/17/30	16,400	3.50	574.00			574.00
Ed. Mullowney	Billings	800	94	7/13/31	75,200	2.25	1,212.00	-	21.00	1,191.00
Clarence Mahler	Hardin	150	98	10/16/30	15,000	4.25				
Clarence Mahler	Hardin	38	98	1/22/31	3,800	3.00	751.50	300.00	49.50	402.00
Musgrave & Lyle	Billings	158	96	10/ 7/30	15,800	3.75	592.50	395.00		197.50
Musgrave & Son	Billings	185	96	10/ 7/30	18,500	3.75	693.75	462.50		231.25
Roy Newton	Billings	378	85	10/23/30	35,910	4.00	1,247.50	567.00	5.65	674.75
W. R. Peterson	Columbus	248	98	9/29/30	24,800	4.00	992.00	500.00	56.00	436.00
Dave Pitch	Crow Agency	373	91	10/17/30	33,943	4.25	1,106.87	600.00		506.87
Grover Reams	Joliet	95	98	9/29/30	9,500	4.00				
Grover Reams	Joliet	352	96	9/30/30	35,200	3.75	1,700.00	1,112.50	24.50	563.00
H. H. Roberts	Edgar	738	93	11/10/30	68,634	3.75	2,057.17	1,845.00		212.17
Henry Roth	Park City	388	98	11/10/30	38,800	3.75	-			
Henry Roth	Park City	398	96	11/10/30	39,800	3.50	2,848.00	1,750.00		1,098.00
Dan Rooney	Billings	519	95	7/13/31	49,305	2.25	849.86		84.00	765.00
Jno. Roth	Billings	560	98	11/22/30	56,000	3.50	1,960.00	600.00		1,360.00
R. D. Shackleford	Billings	1,206	93	7/13/31	112,158	2.25	1,679.35	800.00	110.70	768.65
Sam Sitzman		351	96	7/13/31	35,100	2.00	702.00			702.00
John Sitzman		311	98	7/13/31	31,100	2.25	699.75			699.75
Wilbur Sanderson	Billings	813	91	7/13/31	73,983	2.25	932.92		118.25	814.67
A. L. Spaeth	Laurel	248	98	1/21/31	24,800	3.00	744.00	310.00	91.25	342.75
Kate Story	Laurel	130	98	11/10/30	13,000	3.75				
Kate Story	Laurel	132	96	11/10/30	13,200	3.50	949.50			949.50
Snell Bros.		66	96	1/26/31	6,600	2.75	181.50			181.50
Jos. Strobbe	Pompeys P.	252	96	1/21/31	25,200	2.75				
Jos. Strobbe	Pompeys P.	238	92	1/22/31	21,896	3.00	1,159.48	645.00		514.48
F. W. Schaners	Laurel	519	98	7/13/31	51,900	2.25	1,167.75		100.00	1,067.75
L. Trudean	Custer	400	98	9/24/30	40,000	4.50	1,800.00	1,050.00	14.50	735.50
										[15]
S. C. Tolliver	Billings	117	91	9/30/30	10,647	4.00	320.58	200.00		120.58
F. U. Thull	Laurel	67	98	10/29/30	6,700	4.00	268.00		59.50	208.50
Tom Ungefug	Belfry	174	96	6/ 8/31	17,400	2.00	348.00	264.55		83.45
Carl Ungefug	Belfry	600	98	3/ 5/31	60,000	2.50				
Carl Ungefug	Belfry	38	95	6/ 8/31	3,610	2.25	1,562.22	1,200.00	12.00	350.22
Gus Vande Veegate	Billings	738	96	2/ 5/31	73,800	2.50				
Gus Vande Veegate	Billings	167	93	2/ 5/31	15,531	2.75	2,155.20		10.00	2,145.20
Henry Wickman	Billings	731	94	7/13/31	68,714	2.25	1,107.46	300.00	11.75	795.71
Zaroh Wallace		125	96	7/13/31	12,500	2.00	250.00			250.00
E. Watsabaugh	Laurel	75	95	10/18/30	7,125	4.00	247.50	188.75		58.75
C. S. Wise		500	94	12/ 4/30	47,000	3.50	1,345.00	500.00	82.50	762.50
John Wagner	Park City	277	96	1/21/31	27,700	2.75	761.75	400.00	56.65	305.10
Henry Walker	Hysham	124	94	1/28/31	11,656	3.00	275.28	185.50		89.78
Jno. W. Wise		500	96	10/10/30	50,000	3.75	1,875.00	1,000.00	7.50	867.50
Jno. H. Wagner	Billings	208	96	10/21/30	20,800	3.70				
Jno. H. Wagner	Billings	120	96	10/31/30	12,000	3.50	1,200.00	927.50	77.00	195.50
Peter Wiegand	Hardin	395	96	11/15/30	39,500	3.50	1,377.50	250.00		1,127.50
Henry Yerger, Jr.	Laurel	122	96	2/11/31	12,200	2.50	305.00	165.00	1.90	138.10
Henry Yerger, Sr.	Laurel	194	98	12/ 1/3..	19,700	3.50	689.50	250.00	3.05	436.45
Yost Bros.	Billings	568	94	7/13/31	53,392	2.25	860.52			860.52
Wm. Noteboom	Fairview	432	98	10/ 2/30	43,141	4.00	1,725.64			1,725.64
Aaron Swanson	Dore, N. D.	12	96	10/29/30	1,165	3.75	43.69			43.69
John Hardy	Fairview	88	96	3/10/31	8,817	2.25	198.38			198.38
A. M. Cooley	Sidney	81	94	3/10/31	7,607	2.50	141.67			141.67
Wm. Harrison	Savage	22	94	2/10/31	2,068	2.50	38.50			38.50
Northland Seed Co.	Sidney	94	98	10/ 6/30	9,400	4.00	376.00			376.00
" " "	"	8	98	10/11/30	800	4.00	32.00			32.00
" " " "	"	70	98	10/29/30	7,000	4.00	280.00			280.00
" " " "	"	77	94	3/10/31	7,238	2.50	134.75			134.75
		39,897			3,859,835		106,007.83	38,155.18	2,009.08	65,843.57
										[16]

EXHIBIT C—(Continued)

77,500	lbs	@	$4.50	$3,487.50
192,893	"	"	4.25	8,197.95
415,582	"	"	4.00	16,623.28
511,405	"	"	3.75	19,177.69
601,212	"	"	3.50	21,042.42
122,400	"	"	3.25	3,978.00
144,307	"	"	3.00	4,329.21
273,845	"	"	2.75	7,530.74
186,913	"	"	2.50	4,672.82
1,188,278	"	"	2.25	26,736.25
145,500	"	"	2.00	2,910.00
3,859,935				$118,685.86

Total value of beans	$118,685.86	
Less total hand pick charges	12,678.03	
	106,007.83	
Total cash advances	$ 38,155.18	
" Misc. charges	2,009.08	
	Total Advances	40,164.26

TOTAL BALANCE DUE BEAN OWNERS.....$ 65,843.57

[17]

The Notice of Petition & Bond for Removal contained in said Transcript of Removal is in the words and figures following, to wit: [18]

[Title of Court and Cause.]

NOTICE.

To State of Montana and the Department of Agriculture of the State of Montana, Plaintiffs above named, and to Messrs. L. A. Foot, Attorney General for the State of Montana, of Helena, Montana, T. H. MacDonald, Assistant Attorney General for the State of Montana, of Helena, Montana, and Messrs. Brown, Wiggenhorn & Davis, of Billings, Montana, Attorneys for Plaintiffs above named:

You are hereby notified that the defendant in the above entitled cause is about to file in said District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, a petition that the above entitled cause be removed into the District Court of the United States, for the District of Montana, also a bond on removal to be executed by said defendant, as Principal, and by United States Fidelity & Guaranty Company, a surety company authorized to and doing business in the State of Montana, as Surety, and that said petition and bond will be presented to a judge of said District Court of the Thirteenth Judicial District of the State of Montana, in and

for the County of Yellowstone, for action thereon immediately.

Dated June 1st, 1932.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant.
Helena, Montana. [19]

ACKNOWLEDGMENT OF SERVICE

Due personal service of the within Notice, together with copy of each the petition and bond referred to therein, made and admitted and receipt of copy acknowledged this 1st day of June, 1932.

BROWN, WIGGENHORN & DAVIS,
Attorneys for Plaintiffs.

Filed June 1, 1932, 2 p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9, 1932. [20]

The PETITION FOR REMOVAL contained in said Transcript on Removal is in the words and figures following, to wit: [21]

[Title of Court and Cause.]

PETITION FOR REMOVAL

Now comes Fidelity and Deposit Company of Maryland, and by this its petition respectfully shows to the Court:

I.

That this is a civil action begun against your petitioner in this Court on the 11th day of May, 1932; that when this action was commenced the plaintiffs were, ever since have been and now are residents and citizens of the State of Montana; and this petitioning defendant was, when this action was commenced, ever since has been and now is a corporation duly incorporated under the laws of the State of Maryland, and a non-resident of the State of Montana.

That said suit is brought in the name of the State of Montana and in the name of the Department of Agriculture of the State of Montana on behalf and in the interest of numerous persons, all of whom are citizens and residents of the State of Montana, and the State of Montana has not, nor has the Department of Agriculture of the State of Montana, any interest in said suit, and said suit is not brought in behalf of either The State of Montana or the Department of Agriculture of the State of Montana. [22]

II.

That the matter and amount in dispute in this action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

III.

That this petitioning defendant submits herewith to this Court and files a bond as provided by

the laws of the United States upon the removal of causes from State Courts to the United States Court.

WHEREFORE, Your petitioner prays that this cause be removed to the District Court of the United States, for the District of Montana, and that this Court accept this petition and said bond and proceed no further in said premises, save to cause said removal to be made.

Dated May 31st, 1932.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By T. B. WEIR
Its Attorney, hereto duly authorized.
Petitioner.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Petitioner. [23]

State of Montana,
County of Lewis and Clark.—ss.

T. B. Weir, being first duly sworn, deposes and says:

That he is one of the attorneys for Fidelity and Deposit Company of Maryland, the corporation making the foregoing petition, and makes this verification for and on behalf of said corporation for the reason that there is no officer or agent of said corporation within the County of Lewis and

Clark, State of Montana, wherein this verification is made and affiant resides; that he has read the foregoing petition and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

T. B. WEIR,

Subscribed and sworn to before me this 31st day of May, 1932.

[Notarial Seal] JOHN J. MITCHKE
Notary Public for the State of Montana, residing at Helena, Montana.
My commission expires May 1st, 1933.

Due personal service of within petition for Removal made and admitted and receipt of copy acknowledged this 1st day of June, 1932.

BROWN, WIGGENHORN & DAVIS,
Attorneys for Plaintiffs.

Filed this 1st day of June 1932 at 2 o'clock p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9th, 1932. [24]

The BOND ON REMOVAL contained in said transcript on removal is in the words and figures following, to wit: [25]

[Title of Court and Cause.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as Principal, and United States Fidelity & Guaranty Company, a surety company authorized to and doing business within the State of Montana, as Surety, are held and firmly bound unto the State of Montana, and the Department of Agriculture of the State of Montana, plaintiffs above named, in the penal sum of Three Hundred Dollars ($300.00) for the payment of which, well and truly to be made to said State of Montana and the Department of Agriculture of the State of Montana, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 27th day of May, 1932.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT,

WHEREAS, the Fidelity and Deposit Company of Maryland, the defendant in the above action, is about to petition to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, for the removal of a certain cause of action pending wherein said State of Montana and the Department of Agriculture of the State of Montana are

plaintiffs and Fidelity and Deposit Company of Maryland, a corporation, is defendant, to the District Court of the United States, for the District of Montana;

Now, if said Fidelity and Deposit Company of Maryland shall enter into said District Court of the United States, for the District of Montana, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if such Court [26] shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal and Surety have caused these presents to be executed by their respective officers duly authorized, this 27th day of May, 1932.

[Corporate Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By S. T. NOLAND
Its Agent, hereto duly authorized.
PRINCIPAL.

[Corporate Seal] UNITED STATES FIDELITY & GUARANTY CO.
By DON W. JACOBUS
Its Attorney in Fact. Hereto duly authorized.
SURETY.

Approved:—ROBERT C. STRONG, Judge.

Filed this 1st day of June, 1932 at 2 o'clock p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9th, 1932. [27]

The ORDER OF REMOVAL contained in said transcript on removal is in the words and figures following, to wit: [28]

[Title of Court and Cause.]

ORDER OF REMOVAL

On this 1st day of June, 1932, the above action coming on to be heard on the petition of the defendant Fidelity and Deposit Company of Maryland for removal of the said cause to the District Court of the United States, for the District of Montana, at Montana; and it appearing to me that the said defendant is entitled to have said cause removed to said Court, and that a good and sufficient bond has been filed in said action, conditioned as by the Acts of Congress provided;

NOW, THEREFORE, it is ORDERED, that the said bond be approved and that the said suit and action be, and the same is hereby, removed to the District Court of the United States, for the District of Montana, at ..... Montana; and the Clerk of this Court is hereby authorized, ordered and directed to furnish the petitioner defendant Fidelity and Deposit Company of Maryland, a duly certi-

fied copy of the record in this cause, upon the payment of [29] the legal and customary fees for preparing said record. And this Court will proceed no further in said action, unless the same shall be remanded from the District Court of the United States, for the District of Montana, aforesaid.

Signed and passed in open Court this 1st day of June, 1932.

ROBERT C. STRONG
Judge of said Court.

COURT MINUTE ORDER OF REMOVAL

APRIL TERM

Wed. June 1st, 1932

DEPARTMENT TWO.

Court convened at 9:30 a.m. Present Hon. Robt. C. Strong, Judge presiding, and Geo. M. Hays, Clerk.

[Title of Cause.]

ORDER OF REMOVAL

The defendant having filed the petition and bond for removal of this action, to the District Court of United States for the District of Montana, and it appearing that the defendant is entitled to said removal, the Court orders that this action be removed to the District Court of the United States, for the District of Montana, and the Clerk is authorized and directed to furnish the petitioner, a certified copy of the record upon payment of the

customary fees, and this court will proceed no further in this action until the same has been remanded from the said United States District Court. Order is signed in open court.

Filed this 1st day of June 1932 at 2 o'clock p.m. Geo. M. Hays, Clerk of District Court; by A. W. Stow, Deputy Clerk.

[Endorsed]: Filed June 9, 1932. [30]

The CERTIFICATE of the CLERK of the STATE COURT contained in said transcript on removal is in the words and figures following, to wit: [31]

State of Montana,
County of Yellowstone.—ss.

I, George M. Hays, Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do certify that the above and foregoing 26 pages do constitute and are a full, true, compared and correct copy of the record on removal in the said cause of The State of Montana, and the Department of Agriculture of the State of Montana, for the use and benefit of the holders of warehouse receipts in the public warehouse seed grain elevator of Chatterton & Son, a corporation, plaintiffs, vs. Fidelity and Deposit Company of Maryland, a corporation, defendant, being respectively the complaint, summons and return showing service on

defendant Fidelity and Deposit Company of Maryland, petition of defendant Fidelity and Deposit Company of Maryland for removal, bond on removal, defendant's demurrer to complaint, notice of filing petition for removal with acceptance of service thereon, order of removal to the District Court of the United States, for the District of Montana, and Clerk's minute entry of order of removal including approval of the bond on removal.

WITNESS my hand and the seal of said Court this 8th day of June, 1932.

[Seal] GEORGE M. HAYS
Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

[Endorsed]: Filed June 9, 1932. [32]

Thereafter, on March 9th, 1933, ANSWER was duly filed herein, in the words and figures following, to wit: [33]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, Fidelity and Deposit Company of Maryland, and for its answer to plaintiffs' complaint herein, denies, alleges and avers as follows:

I.

Answering paragraph 1, defendant admits that Chatterton & Son was and is a corporation organized and existing under and by virtue of the laws of Michigan, and operated a warehouse at Billings, Montana, but denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations contained in said paragraph 1.

II.

Answering paragraph 2, defendant admits that it was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana. Except as hereinbefore specifically admitted, defendant denies generally each and every allegation in said paragraph 2 contained.

III.

Answering paragraph 3, defendant admits that as surety and [34] in consideration of $100.00 premium paid, that it executed said bond Exhibit "A" to the complaint. Except as hereinbefore specifically admitted, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 3 contained.

IV.

Answering paragraph 4, defendant denies that it has any knowledge or information thereof sufficient

to form a belief as to whether or not said bond was delivered on or about the 15th day of January, 1930, or at any other time or at all, to the said agent and/or manager of said Chatterton & Son at Billings, Montana, or to any other person at said time or place or at all.

V.

Defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 5 contained.

VI.

Answering paragraph 6 of plaintiffs' complaint, defendant admits that it executed its renewal certificate Exhibit "B" to the complaint, and except as hereinbefore specifically admitted, denies generally and specifically all the allegations in said paragraph 6 contained.

VII.

Answering paragraph 7, defendant admits said renewal certificate by its terms purported to continue said bond in force to July 1, 1931, but denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph 7 contained.

VIII.

Defendant admits the allegations of paragraph 8 of said complaint.

IX.

Answering paragraph 9 of plaintiffs' complaint, defendant denies that in the month of May, 1931, or at any other time or at all [35] said Chatterton & Son delivered said bond and/or the renewal certificate thereof to the State of Montana, and alleges the fact to be that in the month of June or July, 1931, the exact day of which to defendant is unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of Chatterton & Son at Billings, Montana, and did find said bond and renewal certificate set forth in said complaint among the papers of said Chatterton & Son at the said office of Chatterton & Son in Billings, Montana, and did then and there take possession of said bond and renewal thereof and did take and carry said bond and renewal thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of Commissioner of Agriculture of the State of Montana at Helena, Montana, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern, as the said Commissioner of Agriculture of the State of Montana then knew. Except as hereinbefore specifically admitted or denied, defendant denies each and every allegation and all the allegations in said paragraph 9 contained.

X.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 10 of said complaint.

XI.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 11 of said complaint.

XII.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 12 of said complaint. [36]

XIII.

Answering paragraph 13, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not there was converted by Chatterton & Son bags of beans of the number of 39,897, or any other number or at all, of the net value of $65,843.57, or any other sum or at all. Defendant further denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not the loss to the owners of said beans alleged to have been stored with Chatterton & Son was the sum of $40,000.00, or any other sum or at all. Except as hereinbefore specifically admitted or denied, defend-

ant denies generally each and every allegation and all the allegations in said paragraph 13 contained.

XIV.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in said paragraph 14 of said complaint.

XV.

Answering paragraph 15, defendant admits that in the month of June, 1931, the Department of Agriculture of Montana received notice of the insolvency of Chatterton & Son, and that thereafter, to-wit, on or about the 27th day of August, 1931, demand was made on defendant for payment of its bond, which payment defendant refused and still refuses to make.

Except as above admitted, defendant denies that it has any knowledge or information thereof sufficient to form a belief thereof as to the other allegations in paragraph 15 contained, and therefore denies the same.

XVI.

Answering paragraph 16, defendant admits that on or about the 6th day of December, 1930, Chatterton & Son transferred its business to Chatterton & Son, Incorporated, a foreign corporation [37] organized, existing and doing business under the laws of Kansas, but denies that it ever authorized said action by said Chatterton & Son or ever

authorized in writing or in any other way or at all the change in name of Chatterton & Son to Chatterton & Son, Incorporated, or to any other name or at all.

Except as hereinbefore specifically admitted or denied, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph 16 contained.

XVII.

And save as is hereinabove specifically admitted, denied or qualified, this defendant generally denies each and every allegation and all the allegations set forth in said complaint.

And for its further and separate answer, this defendant avers:

I.

That the defendant Fidelity and Deposit Company of Maryland, at all times herein or in said complaint referred to, ever since said times and now was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make, execute and deliver to Chatterton & Son, under and pursuant to Section 3589 Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "A", and by this reference made a part hereof. [38]

IV.

That said bond hereinbefore referred to was made, executed and delivered to said Chatterton & Son in order to qualify them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921.

V.

That although said bond was executed and delivered to said Chatterton & Son to be filed by them with the Commissioner of Agriculture of the State of Montana upon the issuance of a license by said Commissioner of Agriculture of the State of Mon-

tana authorizing said Chatterton & Son to engage in the business of warehousemen for the storage of grain in said State from said January 1st, 1930, to and including July 1st, 1930, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under and pursuant to the laws of the State of Montana relating to said warehousemen storing grain within said State, said bond was never delivered to nor filed with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, or for any other purpose or at all, during the period of said bond.

VI.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "B", and by this reference made a part hereof. [39]

VII.

That during the said period from July 1st, 1930, to and including the month of June 1931, neither the said bond, nor the said continuing certificate had been or was filed with the Commissioner of Agriculture of the State of Montana, nor was the said Chatterton & Son issued any license to do business

in the State of Montana as a warehouseman, or for any other purpose or at all.

VIII.

That in the month of June or July 1931, the exact date of which is to defendant unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of said Chatterton & Son at Billings, Montana, and did take from the office of said Chatterton & Son said bond and certificate of renewal, and did take and carry said bond and renewal certificate thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, and attempt and purport to then issue an alleged license to said Chatterton & Son to do business in the State of Montana as warehousemen, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern and were no longer operating or doing business in the State of Montana, as said Commissioner of Agriculture of the State of Montana then and there knew.

IX.

That Section 3589 and 3589-A, Revised Codes of Montana, 1921, provides expressly for the supervision, licensing and bonding of public warehousemen, and the rights and duties of said State of Montana and/or the Commissioner of Agriculture thereunder

conditioned upon the issuance of said license and filing of bond with the said Commissioner of Agriculture and/or the State of Montana under said statutes, and that since said Chatterton & Son were never [40] issued a license under and pursuant to said Acts and no bond was filed with said Commissioner of Agriculture and/or State of Montana as therein provided, the said State of Montana and/or Commissioner of Agriculture has no right, claim or authority under said Act or the laws of the State of Montana to make claim on this defendant or its said bond, or bring suit on said claim, or right of claim whatsoever.

And for its further and separate answer, this defendant avers:

I.

That the defendant Fidelity and Deposit Company of Maryland, at all times herein or in said complaint referred to, ever since said times and now was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make, execute and deliver to Chatterton & Son, under and pursuant to Section 3589 Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

IV.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its [41] certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

V.

That said bond and renewal thereof was and is a warehouseman's bond to cover the storage of grain pursuant to Section 3589 of the Revised Codes of Montana, 1921, conditioned upon the acts and duties enjoined upon grain warehousemen by the law and for the use and benefit of and to indemnify the owners of grain stored with said warehousemen against loss.

VI.

That Sections 3592-1 and Section 3592-2 of the Revised Codes of Montana, 1921, as amended by Chapter 50 of the Session Laws of Montana of 1927, provides for the license and kind of bond to be furnished to the Commissioner of Agriculture of the State of Montana and/or the State of Montana by warehousemen handling agricultural seeds, beans, peas, as distinct from grain, etc., which is separate and distinct from the bond filed by the defendant herein and required under Section 3589 of the Revised Codes of Montana, 1921, and upon which said action herein is based.

VII.

That said claim herein is made upon said defendant by said State of Montana and Department of Agriculture of said State on behalf of owners of beans stored with said Chatterton & Son and not to indemnify owners of grain upon which said bond of said defendant and the liability thereunder was and is conditioned.

WHEREFORE, Having fully answered said complaint, said defendant prays:

1. That plaintiff take nothing by its said complaint;

2. That defendant be awarded its costs of suit herein expended.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant. [42]

State of Montana,
County of Lewis and Clark.—ss.

T. B. Weir, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant Fidelity and Deposit Company of Maryland, the corporation making the foregoing answer, and as such makes this verification for and on behalf of said corporation, for the reason that there is no officer of said defendant within the said County of Lewis and Clark aforesaid, wherein affiant resides; that he has read said answer and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

T. B. WEIR

Subscribed and sworn to before me this 9th day of March, 1933.

[Notarial Seal] JOHN J. MITCHKE
Notary Public for the State of Montana, residing at Helena, Montana.
My Commission expires May 1st, 1933. [43]

EXHIBIT A.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [44]

EXHIBIT B.

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

Due personal service of within Answer made and admitted and receipt of copy acknowledged this 9th day of March, 1933.

BROWN, WIGGENHORN
& DAVIS,
RAYMOND T. NAGLE,
Atty. General.
By O. A. PROVOST
Attorneys for Plaintiff.

[Endorsed]: Filed March 9, 1933. [45]

Thereafter, on March 23rd, 1933, REPLY was duly filed herein, in the words and figures following, to wit: [46]

[Title of Court and Cause.]

REPLY.

Come now the plaintiffs in the above entitled action and for their reply to the answer of the defendant in said action, admit, deny and allege as follows:

I.

Deny generally and specifically all of the allegations in the further and separate answers contained in said answer and all new matter contained in said answer, save and except as the matters therein contained are alleged in the plaintiffs' complaint on file herein.

WHEREFORE having fully replied to said answer, plaintiffs renew their prayer for judgment.

RAYMOND T. NAGLE
Attorney General.
E. K. MATSON
Asst. Attorney General.
BROWN, WIGGENHORN
& DAVIS
Attorneys for Plaintiffs. [47]

State of Montana,
County of Lewis & Clark.—ss.

R. T. NAGLE, being first duly sworn deposes and says:

That he is the attorney general of the State of Montana and makes this verification as such on behalf of the state of Montana and the plaintiffs in the above entitled action; that he has read the foregoing reply and knows the contents thereof and

that the same is true to the best knowledge, information and belief of affiant.

RAYMOND T. NAGLE

Subscribed and sworn to before me this 23rd day of March, 1933.

[Seal] OSCAR A. PROVOST

Notary Public for State of Montana, residing at Helena, Montana.

My commission expires Nov. 23, 1935.

[Endorsed]: Filed March 23, 1933. [48]

Thereafter, on December 10th, 1934, MOTION FOR LEAVE TO FILE AMENDED COMPLAINT and NOTICE OF MOTION were duly filed herein, in the words and figures following, to wit: [49]

[Title of Court and Cause.]

MOTION TO AMEND COMPLAINT

Come now the plaintiffs in the above entitled action and move this Honorable Court and respectfully pray for leave to amend their complaint in the above entitled action in conformity with the engrossed copy of Amended Complaint served herewith and that said Amended Complaint, as filed herein, may supersede and supplant the complaint

now on file, and that the said cause may be transferred to the equity side of this Court.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiff. [50]

[Title of Court and Cause.]

NOTICE OF MOTION

To the above named Defendant and to Messrs. T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the hereto attached motion and move the above entitled court in conformity therewith and will ask leave to amend their complaint at the courtroom of said court in the Federal Building at ....., Montana, on the ..... day of December, 1934, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard.

Said motion is based upon the files and records of said cause.

Dated this ..... day of December, 1934.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 10, 1934. [51]

Thereafter, on December 21, 1934, the DEFENDANT'S OBJECTIONS to Motion to Amend Complaint were duly filed herein, in the words and figures following, to wit: [52]

[Title of Court and Cause.]

OBJECTIONS OF DEFENDANT TO MOTION OF PLAINTIFF TO AMEND.

Comes now the defendant, Fidelity and Deposit Company of Maryland, and through its attorneys objects to the application of plaintiff herein to amend its said complaint in conformity with the copy of the amended complaint filed with the motion herein, on the grounds and for the reasons as follows:

I.

That said proposed amended complaint sets up a new, separate and independent cause of action from that in the original complaint, the said proposed amended bill of complaint changing the cause of action from one on a statutory bond liability to a suit for reformation of an instrument on the grounds of mutual mistake and the enforcement of said reformed instrument.

II.

That said proposed new cause of action set forth in said amended complaint for reformation of an instrument on the grounds of mistake is barred under and pursuant to the Statute of Limitations of the State of Montana, to-wit, Part 4 of Section

9033, Revised Codes of Montana, 1921, requiring said action to be brought within two (2) years after discovery of facts constituting the mistake, also Sec. 9032 & 9033 Revised Codes of Montana 1921. [53]

III.

That said proposed amended complaint is an attempt by plaintiff to abandon its former cause of action under Sections 3589, 3589-A and/or 3592 to 3592-9 of the Revised Codes of Montana, 1921, and the Acts of the Montana Legislative Assembly supplemental thereto and amendatory thereof, and to bring a new and independent proceeding based on the common law.

IV.

That said proposed amended complaint is an attempt to change said cause from an action at law to a bill in equity.

V.

That said application is not timely and said plaintiff is guilty of laches in that said original complaint was filed herein on or about the 12th day of May, 1932; that all pleadings by the defendant have been on file herein and said above cause has been at issue in this said Court since the 23rd day of March, 1933.

WHEREFORE, defendant prays for an order of this Court, dismissing the application of plaintiff for permission to file said amended complaint,

and that if said amended complaint is already on file herein, that the same be striken.

Dated this 18th day of December, 1934.

T. B. WEIR,
HARRY P. BENNETT
Attorneys for Defendant, Fidelity and Deposit Company of Maryland.

[Endorsed]: Filed Dec. 21, 1934. [54]

Thereafter, on March 4th, 1935, the DECISION of the Court Allowing the Filing of Amended Complaint was duly filed herein, in the words and figures following, to wit: [55]

[Title of Court and Cause.]

DECISION.

Plaintiffs moved to amend their complaint followed by objections from the defendant. Oral arguments were heard, and briefs submitted. The relief sought by the amendment is very closely connected with the principal purpose of the action, which is to recover on a bond issued by defendant to indemnify the owners of a large quantity of beans stored in the warehouse of Chatterton & Son of Billings, Montana, according to plaintiff's contention. After a careful consideration of the arguments and authorities, the Court is of the opinion that the plaintiffs should be permitted to make the amendment proposed. (28 U. S. C. A. 397, Montgomery's Manual Sec. 379). The case

of Proctor & Gamble Company v. Powelson, 288 Fed. 299, seems to be as good an authority for the plaintiffs as the defendant, under the facts alleged by the former in the original complaint and in the proposed amendment; and so far as the Court can determine from these alleged facts, the amendment does not substantially change the claim on the one hand or the defense on the other; it appears to be practically a continuation of the original cause, and therefore does not present "an entirely different cause of action, supported by testimony [56] wholly or in part different", nor disclose that "the judgment or decree to be obtained would thus rest upon entirely different pleadings and substantially different testimony." The proposed amendment does not call for "an entirely different character and subject matter of proof." The quotations are from the case above cited. In other words, there is no substantial difference in the proof called for in either instance, and as it appears to the Court, the defense would be substantially the same, and probably the same witnesses would be called on both sides, if they can be found after so great a lapse of time, which, however, the defendant should not be permitted to take advantage of, as the Court construes its authority herein.

The allegations of the plaintiffs make it appear that the bond in question was not the real contract between the parties as to the actual thing insured, and that at the time of execution thereof, the parties understood and knew that the word "beans" should

have appeared in the bond and not the word "grain", which was used in the printed form. Equity should here intervene and grant the relief sought, if such proof can be made, according to the true intent of the contracting parties.

From the list attached to the complaint it appears that a large number of bean growers in the Yellowstone Valley had stored their product with Chatterton & Son, bonded warehousemen; presumably feeling that the result of their toil was secure and well protected by Chatterton and Son under their bond against loss, issued by the defendant herein. Adherence to local rules and statutes might deprive the plaintiffs of a right to produce evidence to establish the essential facts in this case. In the furtherance of justice no local rule should be allowed to interfere, to prevent the allowance of the proposed amendment.

In view of the foregoing, plaintiffs should be permitted to amend in accordance with their motion, and it is so ordered.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Mar. 4, 1935. [57]

Thereafter, on March 4th, 1935, an AMENDED COMPLAINT was duly filed herein, in the words and figures following, to wit: [58]

[Title of Court and Cause.]

AMENDED COMPLAINT

In Equity.

Come now the plaintiffs in the above entitled action and for their amended complaint herein, for cause of action allege:

I.

That the defendant, Fidelity and Deposit Company of Maryland, now is and at all times herein mentioned was a foreign corporation organized and existing under and by virtue of the laws of the state of Maryland and authorized to do business as a surety and bonding company and to become a surety on bonds and undertakings in the state of Montana.

II.

That at all times herein mentioned Chatterton & Son was a corporation organized and existing under and by virtue of the laws of the state of Michigan and operated, and conducted a public warehouse for the storage of beans and engaged in the business of storing beans at Billings, Montana. That said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana.

III.

That the said Chatterton & Son at all times herein mentioned and for a long time prior thereto was in

the business of storing, buying, selling and handling beans exclusively, operating various branches in the United States, including the said warehouse so [59] operated by it at Billings, Montana, and said Billings warehouse at all times was a warehouse for the storage of beans alone, and particularly said warehouse was not used for the storage of grain; all of which facts were at all times herein mentioned, and particularly at the time when the bond hereinafter referred to was executed as well as the time when the extension thereof was executed, well known and understood by the defendant.

IV.

That for the purpose of affording security to the owners of beans stored with said Chatterton & Son and the holders of warehouse receipts to be issued therefor, and to serve as an inducement to the owners of beans to store the same with said Chatterton & Son and so that it might advertise itself and hold itself out as operating a bonded warehouse, and in compliance with the laws of the State of Montana, the said Chatterton & Son did on or about the 7th day of January, 1930, procure from the defendant, and said defendant did then, for a valuable consideration and the payment of a substantial premium, issue, execute, deliver and make effective its certain bond and indenture in writing, in the sum of Ten Thousand Dollars, dated the same day, as surety for the said Chatterton & Son, as principal, to the State of Montana, for the benefit of all persons storing beans in the said

warehouse of Chatterton & Son at Billings, Montana; a true and correct copy of which bond and indenture in writing is hereto attached, marked "Exhibit A", hereby referred to and made a part hereof as though herein set out in full.

V.

That at the time of the issuance, execution and delivery of said bond and the renewal thereof as hereinafter recited, the said Chatterton & Son was not receiving for storage and previously thereto has never received or stored, grain in its said warehouse at [60] Billings, Montana, but beans alone, and said bond was by said Chatterton & Son sought and required only for the storage of beans, all of which was at said time well known to and understood by the defendant. That as appears from the said Exhibit A, the condition recited in said bond is in words as follows:

"NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relating to the business of Public Warehouseman, then this obligation to be null and void, otherwise, to remain in full force and effect."

That at the time of the execution of said bond it was intended both by the said Chatterton & Son and the defendant that by the said bond the defendant would undertake and agree to indemnify the said owners of beans stored in said warehouse against the loss of said beans and would insure said persons against such loss and that the identical beans so stored by said persons in said warehouse would be returned to them upon demand and that the said Chatterton & Son would discharge all of its duties and obligations as bailee; and both said Chatterton & Son and the defendant intended that such would be the legal consequences of said bond and supposed that that was its legal effect.

VI.

That through a mutual mistake of the said Chatterton & Son and the defendant, and by the inadvertence of the said parties, the said bond did not, and does not, truly state or express the intention of the said parties in that the bond, in its said condition, referred to the owners of grain stored in said warehouse, to be indemnified, instead of the owners of beans, as was intended, and in that connection used the word "grain" [61] instead of the word "beans". That in preparing said bond the said parties mistakenly and through lack of care and attention, used a printed form, containing the word "grain" printed therein as aforesaid, which form was designed and ordinarily used for elevators and grain warehousemen and was not especially designed for a bond covering a bean warehouse; and

both of said parties, in preparing and executing said bond, failed to notice the said discrepancy and inapt language, or carelessly supposed that the word "grain" was sufficiently comprehensive to include beans within its meaning.

VII.

That plaintiff is informed and believes that sometime about December 6, 1930, the said Chatterton & Son incorporated a portion of its business, including the said Billings, Montana Branch, under the name of Chatterton & Son Inc., a corporation organized by said Chatterton & Son and a wholly owned subsidiary of said Chatterton & Son, all of the stock in which was owned by said Chatterton & Son, not under the laws of the State of Montana. That if, however, in fact there was any change in ownership, possession, title or management of said warehouse, it was not disclosed to the public and particularly not disclosed to any of the said persons who then or thereafter had beans stored in said warehouse and was a private and confidential arrangement of the said Chatterton & Son and its said subsidiary, Chatterton & Son Inc., and the officers and agents thereof, and the said warehouse continued to be operated under the name of Chatterton & Son and all warehouse receipts were issued and all business done, at all times, under the said name of Chatterton & Son. That the defendant, in writing, on the said 6th day of December, 1930, expressly consented, as surety upon said bond, to said change in name and relationship and continued

the said bond in force for the said period with the principal changed to Chatterton & Son Inc. That said Chatterton & Son Inc. likewise never qualified under the laws of Montana to do business in the state. [62]

VIII.

That at all times after the execution of said bond the said Chatterton & Son, or its successor, Chatterton & Son Inc., relied thereon and made it known to the growers and owners of beans in the agricultural territory surrounding Billings, Montana, and served by said warehouse, and particularly the holders of warehouse receipts hereinafter referred to, that a bond in form as so intended had been executed and delivered and was effective and that by its terms it afforded protection, indemnity and insurance to any and all persons storing beans in said warehouse for the return of their beans and against their loss; and advertised and represented the said warehouse so operated by it at Billings, Montana, to be a bonded warehouse, all upon the faith of said bond.

IX.

That on or about the first day of July, 1930, at the request of said Chatterton & Son and for a valuable consideration and the payment of a substantial premium and for the same purposes and ends aforementioned, and to continue the said bond in force and effect for the ensuing year, the defendant issued, executed and delivered its certain con-

tinuation certificate and indenture in writing, continuing said bond, as so intended, in force for the further term of one year, beginning on the said first day of July, 1930, whereby the said bond was continued in full force and effect and its life extended to July 1, 1931; a true copy whereof is hereto attached, marked "Exhibit B", hereby referred to and made a part hereof as though herein set out in full.

X.

That pursuant to the instructions and intentions of the defendant the said bond and continuation certificate were in due course filed with the Department of Agriculture, Labor and Industry of the State of Montana, and the same have ever since been, and now are there on file. [63]

XI.

That in reliance upon said bond and the security afforded thereby, and while the same was so in force and effective, during the period from July 1, 1930 to June 30, 1931, there was delivered for storage and stored with said Chatterton & Son or its successor, Chatterton & Son Inc., at its said warehouse at Billings, Montana, by divers and sundry residents of the state of Montana and owners of beans grown in said agricultural territory, in individual lots and at different times, a total of 39897 bags of beans of one hundred pounds each, and there was issued to each of said persons, by said Chatterton & Son, or its successor Chatterton

& Son Inc., a warehouse receipt for the identical beans so in each instance deposited for storage, by the terms of which receipts said beans were received for storage only and as a bailment.

XII.

That all of the said beans were so delivered for storage by the owners thereof without knowledge of the exact words contained in said bond and particularly without knowledge that by the precise terms of said bond it assumed to indemnify the owners of grain instead of the owners of beans, and they were lead to believe and did believe that the said bond by its express terms indemnified and protected them against loss in the storage of such beans; and in so storing said beans they relied upon the representations made to them as aforesaid concerning said bond.

XIII.

That the delivery of said beans for storage and the storage of said beans by said growers and owners, in each instance, constituted a bailment, and it became and was the duty of said Chatterton & Son, or its successor Chatterton & Son Inc., at all times to preserve the identity of each of said lots of beans so stored so as to permit the return and delivery to each owner of the identical beans so stored by him and not to [64] commingle said beans or to exercise any acts of dominion or ownership over the same or to sell or dispose of any of the same or to do any thing that would prevent

the return and delivery to the said respective owners, upon demand and surrender of warehouse receipt, of the identical beans so stored.

XIV.

That notwithstanding its duty as aforesaid, the said Chatterton & Son, or its successor Chatterton & Son Inc., upon the delivery to it of said beans, commingled the same and failed to preserve their identity. That without the knowledge of any of the owners of said beans and the holders of warehouse receipts for the same, the said Chatterton & Son, or its successor Chatterton & Son Inc., during the life of said bond, removed all of the said beans from the said warehouse and from the State of Montana, and either sold the same or otherwise converted the same to its own use, without in any way accounting for the said beans. That thereby said Chatterton & Son, and Chatterton & Son Inc. failed to faithfully perform their duties as a public warehouseman and breached the condition of said bond.

XV.

That promptly after said conversion and loss, demand was duly made upon the said Chatterton & Son and said Chatterton & Son Inc. for the said beans so stored, or their value, but that the said Chatterton & Son or the said Chatterton & Son Inc. were unable to and failed and refused to redeliver or return the said beans or any of them, and the owners of said beans have thereby suffered the full

loss of said beans and of their value. That, however, upon intervention of the Commissioner of Agriculture of the State of Montana, a portion of the loss so sustained by the owners of said beans was recovered by the said Commissioner of Agriculture. That the total value [65] of said beans so converted, after crediting thereon all money and everything else of value recovered as aforesaid, was in excess of the sum of $40,000.00, and the net loss to said holders of warehouse receipts on account of the loss of said beans and the acts aforesaid, was in excess of the said sum of $40,000.00 and they have been damaged in that amount.

XVI.

That on or about the 6th day of December, 1930, the defendant in writing recognized and acknowledged its liability upon said bond to the effect as in this complaint stated to be intended, and confirmed the said intention.

XVII.

That this action is brought and is being prosecuted for the benefit of all of the said owners and holders of warehouse receipts as aforesaid, and is brought and is being prosecuted by the State of Montana at their special instance and request; and the Attorney General of the State of Montana has been by them and by the said Commissioner of Agriculture requested to bring this action and to enforce the penalty of said bond. That all of the property of said Chatterton & Son and of said

Chatterton & Son Inc. and all means of recovery against them or either of them, have been exhausted, and that no part of the said net loss aforesaid has been paid.

XVIII.

That on or about the 15th day of August, 1931, the said Commissioner of Agriculture demanded payment of the defendant of the said loss to the amount of the penalty named in said bond, to-wit: the sum of $10,000.00, but that the said defendant refused and has ever since refused to pay the same, and the same has not been paid.

WHEREFORE plaintiff prays judgment: That the said bond be reformed and corrected so as to express the true intent and meaning of the said parties, and as [66] so reformed, the said bond be enforced against the defendant, and the plaintiff be awarded judgment for the sum of $10,000.00 with interest thereon at the rate of six per cent per annum from July 1, 1931; that plaintiff be awarded its costs of action herein expended; and for such other and further relief as may be agreeable to equity; all for the use and benefit of the said holders of warehouse receipts aforesaid.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs. [67]

State of Montana,
County of Lewis and Clark.—ss.

Raymond T. Nagle, being first duly sworn, deposes and says:

That he is the attorney general of the state of Montana and makes this verification as such on behalf of the State of Montana; that he has read the foregoing complaint and knows the contents thereof and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

RAYMOND T. NAGLE
Attorney General

Subscribed and sworn to before me this 3rd day of November, 1934.

[Seal] OSCAR A. PROVOST
Notary Public for the State of Montana, residing at Helena, Montana.
My commission expires Nov. 23, 1935.

[Endorsed]: Filed Mar. 4, 1935. [68]

EXHIBIT A.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931, here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [69]

EXHIBIT B.

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

[Endorsed]: Filed, March 4, 1935 [70]

Thereafter, on March 21st, 1935, MOTION TO DISMISS AMENDED COMPLAINT was filed herein, in the words and figures following, to wit: [71]

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the Fidelity and Deposit Company of Maryland, a corporation, defendant in the above entitled action, and moves the Court to dismiss the amended complaint in equity filed in said action, upon and for the following grounds and reasons:

I.

It appears from the face thereof that said amended complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against said defendant.

II.

It appears from the face thereof that the amended complaint does not state facts sufficient to entitle the plaintiffs to any relief.

III.

It appears on the face of said amended complaint that the causes of complaint are stale and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof. [72]

IV.

It appears from the face of the amended complaint herein that if plaintiffs ever had any cause of action against this defendant for reformation, as alleged in said complaint, said cause of action accrued about three (3) years before the filing of said amended complaint, as appears on the face of said bill, and is barred under and pursuant to the Statutes of Limitations of the State of Montana, and is long since barred by laches, and should not now be permitted to be asserted in a Court of Equity.

V.

It appears from said amended complaint that there is a defect of parties to said action, in that Chatterton & Son, a corporation, is not either a

party plaintiff nor a party defendant, although the complaint shows on its face that said Chatterton & Son is a necessary party to a complete determination of the action, in that it is the principal obligor in the contract of suretyship which is sought to be reformed in said amended complaint, and is one of the parties to said bond or instrument and one of the necessary and indispensable parties to be before this Court before this case can be tried.

VI.

On the face of the amended complaint it is disclosed that plaintiffs and/or the Department of Agriculture, Labor and Industry thereof, are not the real parties in interest, in that it is shown that neither the State of Montana nor the Department of Agriculture, Labor and Industry thereof, made any mistake in connection with the bond, or that there was any agreement with the State or any of its representatives that a bean warehouse bond should be executed, rather than a grain warehouse bond, nor is there any claim that the State relied upon the fact that the bond, as executed, was to cover a bean warehouse rather than a grain warehouse.

VII.

The bill of complaint does not show any vested interest in the [73] plaintiffs in the subject matter of the suit, nor any right to have the same reformed, in that it does not show that there was any mistake between the plaintiffs and defendant herein,

but that the mistake, if any there was, occurred between the principal, Chatterton & Son, and defendant.

WHEREFORE, defendant prays that the said amended complaint may be dismissed and that the said defendant may be hence dismissed with its costs in its behalf incurred, and for such other and further relief as to the Court may seem just; and it is further moved that defendant's time to answer or file any further proper pleading be extended pending the determination of the present motion.

Dated this 20th day of March, 1935.

T. B. WEIR,
HARRY P. BENNETT,
Solicitors for Defendant.

[Endorsed]: Filed March 21, 1935. [74]

Thereafter, on April 9th, 1935, a STIPULATION submitting Motion to Dismiss was filed herein, in the words and figures following, to wit: [75]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between the above named plaintiffs and the above named defendant, through their respective counsel, that the Motion to Dismiss the Complaint, filed herein on behalf of the defendant,

shall be submitted upon the written memorandum of authorities in support thereof, filed by the respective parties; with twenty (20) days after Court's ruling thereon to further plead.

Dated this 6th day of April, 1935.

R. G. WIGGENHORN
Attorneys for Plaintiffs.
T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant.

[Endorsed]: Filed April 9, 1935. [76]

Thereafter, on June 17th, 1935, the ORDER of the Court Denying the Motion to Dismiss Amended Complaint was duly entered herein, in the words and figures following, to wit: [77]

[Title of Court and Cause.]

DECISION OF COURT ON MOTION TO DISMISS.

Endorsed on back of Motion to Dismiss.

The within motion to dismiss the Amended Complaint was submitted on briefs according to Stipulation of Counsel for the respective parties. The Court has considered the Motion and briefs in connection with the Amended Complaint, and being duly advised, and good cause appearing therefor,

the said Motion is hereby denied, with ten days to answer upon receipt of notice hereof.

CHARLES N. PRAY,
Judge.

[Endorsed]: Entered June 17, 1935. [78]

Thereafter, on March 14th, 1935, Defendant's BILL OF EXCEPTIONS was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [79]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the 11th day of May, 1932, the plaintiff in this cause filed in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, its complaint as follows:

[PRINTER'S NOTE: The Plaintiff's Complaint filed on the 11th day of May, 1932, here set forth in the typewritten transcript is already set forth in this printed record at pages 2-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [80]

That upon application of defendant, said cause was duly removed to this Court, said Transcript on

Removal, including said complaint, being filed herein on June 9th, 1932.

That thereafter and on the 9th day of March, 1933, there was duly filed herein defendant's Answer to complaint of plaintiffs, as follows:

[PRINTER'S NOTE: The Defendant's Answer filed March 9, 1933, here set forth in the typewritten transcript is already set forth in the printed record at pages 32-46, and is pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [81]

That on the 23rd day of March, 1933, plaintiff filed herein its reply to defendant's Answer, as follows:

"[Title and Cause]

REPLY.

Come now the plaintiffs in the above entitled action and for their reply to the answer of the defendant in said action, admit, deny and allege as follows:

I.

Deny generally and specifically all of the allegations in the further and separate answers contained in said answer and all new matter contained in said answer, save and except as the matters therein contained are alleged in the plaintiffs' complaint on file herein.

WHEREFORE having fully replied to said answer, plaintiffs renew their prayer for judgment.

(Verification)

RAYMOND T. NAGLE
Attorney General.
E. K. MATSON
Asst. Attorney General.
BROWN, WIGGENHORN
& DAVIS
Attorneys for Plaintiffs."

That on December 4th, 1934, plaintiff filed its written Motion, asking leave to amend its complaint, together with Notice of Motion, as follows:

"[Title and Cause]

MOTION TO AMEND COMPLAINT.

Come now the plaintiffs in the above entitled action and move this Honorable Court and respectfully pray for leave to amend their complaint in the above entitled action in conformity with the engrossed copy of Amended Complaint served herewith and that said Amended Complaint, as filed herein, may supersede and supplant the complaint

now on file, and that the said cause may be transferred to the equity side of this Court.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN,
Attorneys for Plaintiff. [82]

[Title and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to Messrs. T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the hereto attached motion and move the above entitled court in conformity therewith and will ask leave to amend their complaint at the courtroom of said court in the Federal Building at ....., Montana, on the ..... day of December, 1934, at the hour of ten o'clock A.M. or as soon thereafter as counsel can be heard.

Said motion is based upon the files and records of said cause.

Dated this ..... day of December, 1934.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs."

and attached thereto a copy of the proposed amended complaint, to-wit:

[PRINTER'S NOTE: Plaintiff's proposed amended complaint here set forth in the typewritten transcript is already set forth in the printed record at pages 54-67, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [83]

That on December 21, 1934, defendant filed its written objections and/or motion to strike herein, as follows:

[PRINTER'S NOTE: Defendant's Objections to motion of Plaintiff to amend here set forth in the typewritten transcript is already set forth in the printed record at pages 50-52, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [84]

That thereafter by agreement of counsel this cause came on for hearing on the 27th day of December, 1934, at the City of Helena in said District, the plaintiff being represented by R. G. Wiggenhorn, Esq., and defendant represented by Harry P. Bennett, Esq., wherein oral arguments were heard and thereafter briefs submitted by plaintiff and defendant and the same taken under consideration by the Court.

That thereafter and on the 4th day of March, 1935, the Court rendered the following decision and order in said cause:

[PRINTER'S NOTE: Decision of the Court here set forth in the typewritten record is already set forth in the printed record at pages 52-54, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [85]

which sustains the motion of plaintiffs and to which the defendant excepts and now presents this, its Bill of Exceptions, and asks that the same be allowed and settled.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Defendant. [87]

The undersigned attorneys for and on behalf of plaintiff in the above entitled cause, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 11th day of March, 1935, and having examined the same, do agree that the same is true and correct and that the same may be allowed, settled, signed and filed and made a part of the record in said cause and do hereby waive the right to be present at the settling and allowance of said Bill of Exceptions.

RAYMOND T. NAGLE,
Atty. Genl.
ENOR K. MATSON,
Asst. Atty. Genl.
R. G. WIGGENHORN
Attorneys for Plaintiffs.

It is ordered that the above and foregoing be and the same is herewith duly signed, certified, and allowed as the bill of exceptions in said cause, and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 14th day of March, A. D. 1935.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed March 14, 1935. [88]

Thereafter, on July 1, 1935, ANSWER TO AMENDED COMPLAINT was duly filed herein, in the words and figures following, to wit: [89]

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Fidelity and Deposit Company of Maryland, and for its Answer to plaintiffs' Amended Complaint in Equity herein, denies, alleges and avers as follows:

I.

Answering paragraph I, defendant admits that it was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana. Except as hereinbefore specifically admitted, de-

fendant denies generally each and every allegation in said paragraph I contained.

II.

Answering paragraph II, defendant admits that Chatterton & Son was and is a corporation organized and existing under and by virtue of the laws of Michigan, and operated a warehouse at Billings, Montana; admits that said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana as a warehouseman or otherwise or at all, and in this respect alleges [90] the fact to be that said Chatterton & Son failed to file the said bond herein, or any bond, with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all.

III.

Answering paragraph III, defendant admits that Chatterton & Son were engaged in storing, buying, selling and handling of beans, operating various branches in the United States, but specifically denies that Chatterton & Son handled beans exclusively, and in this respect alleges the fact to be that, in addition to beans, Chatterton & Son engaged in the storing, buying, selling and handling of grain, coal, building materials and other supplies over the United States; defendant further denies

that it has any knowledge or information thereof sufficient to form a belief as to whether or not said warehouse at Billings, Montana, was used for the storage of beans exclusively; and denies that it, its officers or agents knew what business said Chatterton & Son were engaged in in Montana, and in this respect allege the fact to be that said defendant understood, and particularly at the time said bond mentioned in said Complaint was executed, thought and understood that Chatterton & Son were engaged in the storing, buying and selling of grain in the said State of Montana; except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph III contained.

IV.

Answering paragraph IV, defendant admits that as surety and in consideration of a premium paid it executed said bond, Exhibit "A" to the Complaint, but denies that said bond was executed for the benefit of persons storing beans, and allege the fact to be that said bond referred to in said Complaint was executed upon written [91] application of Chatterton & Son in order to qualify them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana, receiving grain for storage,

to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. Except as hereinbefore specifically admitted or denied, defendant denies generally and specifically each and every allegation and all the allegations in said paragraph IV contained.

V.

Answering paragraph V, defendant admits that said bond referred to therein contained the provision quoted in said paragraph V, but denies that at the time of the issuance and/or execution of said bond, or the renewal thereof, or at any other time or at all, the defendant intended to or did indemnify the owners of beans against loss, as in said paragraph V set forth, or otherwise or at all, and in this respect allege the fact to be that said bond and/or renewal thereof was executed with the purpose and intent of qualifying Chatterton & Son as warehousemen engaged in the storage of grain in the State of Montana and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the said State of Montana, receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. Except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph V contained.

VI.

Answering paragraph VI, defendant admits that said bond contained the word "grain", as set forth in said paragraph VI, and that the bond was on a printed form furnished by the State of Montana, but specifically denies that the said word "grain" was mistakenly inserted [92] instead of the word "bean", and denies that the said defendant intended to write a bond covering a bean warehouse, as in said paragraph VI alleged, and in this respect alleges the fact to be that, upon written application of said Chatterton & Son, the said defendant executed a grain warehouseman's bond in order to qualify said Chatterton & Son in the State of Montana as a warehouseman engaged in the storage of grain, and that at the time of the said issuance and/or execution of said bond and/or the renewal thereof there was no authority given the State of Montana and/or the Department of Agriculture, Labor and Industry thereof, to regulate, supervise and/or license bean warehousemen in the State of Montana, and no Act regulating the licensing or supervising of the business of warehousing or storing of beans, or requiring said warehousemen storing beans to procure or furnish a bond and/or prescribing penalties for violations thereof, or fixing conditions and providing for recovery thereunder through the State of Montana and/or the Department of Agriculture, or any other person or at all, but that by an Act of the 23rd Legislative Assembly of the State of Montana, 1933, approved March 7th,

1933, and being Chapter 55 of the Session Laws of the 23rd Legislative Assembly, and after this said bond was executed and after suit had been started and complaint filed herein, there was passed an Act regulating the business of warehousing or storing of beans and requiring persons engaged in that business to procure a license and furnish a bond, and prescribing the powers and duties of the Commissioner of Agriculture thereunder; and that thereafter, under and pursuant to Chapter 164 of the Session Laws of the 24th Legislative Assembly, 1935, the Act aforesaid of 1933 was repealed and there was a new Act passed governing the licensing and regulating of the dealers engaged in buying, selling, warehousing or storing of beans, providing for the license to be issued to said warehousemen and prescribing the powers and duties of the Commissioner of Agriculture thereunder, but that at the time that the said bond and/or renewal thereof was executed and issued, as in said Amended complaint set forth, there was no intent or authority under which said defendant [93] could issue a bond to the State of Montana covering the licensing and supervision of bean warehousemen, and that at the time of the issuance and execution of said bond and renewal thereof the said defendant intended to and did issue and execute a public warehouseman's bond covering the storage of grain, and understood and believed that the said Chatterton & Son were engaged in the general grain business in the State of Montana and in the buying, selling, storing and warehousing

of same; except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation and all the allegations in said paragraph VI contained.

VII.

Answering paragraph VII, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not on or about December 6th, 1930, or at any other time or at all, the said Chatterton & Son incorporated a portion of its business, or any of its business, under the name of Chatterton & Son, Inc., and denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph VII contained.

VIII.

Answering paragraph VIII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

IX.

Answering paragraph IX, defendant admits that it executed its renewal certificate, Exhibit "B" to the Amended complaint, and except as hereinbefore specifically admitted, denies generally and specifically all the allegations in said paragraph IX contained.

X.

Answering paragraph X, defendant denies that said bond and/or the continuation certificate thereof

were delivered to said Department of Agriculture, Labor and Industry, of the State of Montana, as in said paragraph X alleged, and alleges the fact to be that in the [94] month of June or July, 1931, the exact day of which to defendant is unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of Chatterton & Son at Billings, Montana, and did thereafter find said bond and renewal certificate, set forth in said complaint, among the papers of said Chatterton & Son at the said office of Chatterton & Son in Billings, Montana, and did then, or shortly thereafter, take possession of said bond and renewal thereof and did take or send said bond and renewal thereof back to the Capitol at Helena, Montana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern, as the said Commissioner of Agriculture of the State of Montana then knew; except as hereinbefore specifically admitted or denied, defendant denies each and every allegation and all the allegations in said paragraph X contained.

XI.

Answering paragraph XI of said amended complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not, during the period from July

1st, 1930, to June 30th, 1931, or at any other time or at all, there was stored with said Chatterton & Son three thousand, eight hundred and ninety-seven (3,897) bags of beans, or any other number, or at all; and defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the other allegations in said paragraph XI contained.

XII.

Answering paragraph XII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

XIII.

Answering paragraph XIII, defendant denies that it has any [95] knowledge or information thereof sufficient to form a belief.

XIV.

Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the information contained in said paragraph XIV of said Amended complaint.

XV.

Answering paragraph XV, defendant denies that it has any knowledge or information thereof sufficient to form a belief that there were beans converted of the value of Forty Thousand and no/100 Dollars ($40,000.00), or any other sum or at all; defendant further denies that it has any knowledge

or information thereof sufficient to form a belief as to the other allegations in said paragraph XV contained.

XVI.

Answering paragraph XVI, defendant denies that on the 6th day of December, 1930, or at any other time or at all, said defendant, in writing, or otherwise or at all, recognized and acknowledged its liability upon this said bond, or any other bond or at all; except as hereinbefore specifically admitted or denies, defendant denies each and every allegation and all the allegations in said paragraph XVI contained.

XVII.

Answering paragraph XVII, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

XVIII.

Answering paragraph XVIII, defendant admits that on or about the 15th day of August, 1931, demand was made on defendant for payment of said bond, which payment defendant refused and still refuses to make; except as above admitted, defendant denies each and every allegation and all the allegations in said paragraph XVIII contained.

And save as hereinbefore specifically admitted, denied or qualified, this defendant generally denies each and every allegation [96] and all the allegations set forth in said amended complaint.

And for its further and separate answer, this defendant avers:

I.

That the defendant, Fidelity and Deposit Company of Maryland, at all times herein or in said Amended complaint referred to, ever since said times and now, was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said Amended complaint referred to, Chatterton & Son was and is a corporation organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon written application of Chatterton & Son, a true and correct copy of which application is hereto attached, marked Exhibit "A", the defendant herein did make and execute to Chatterton & Son, under and pursuant to Sections 3589, Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "B" and by this reference made a part hereof; that said bond hereinbefore referred to was made and executed to said Chatterton & Son in order to qualify

them as warehousemen engaged in the storage of grain in the State of Montana, to-wit, at Billings, Montana, during the period from January 1st, 1930, to July 1st, 1930, and under and pursuant to said laws of the State of Montana governing the regulation, supervision and licensing of warehousemen within the State of Montana receiving grain for storage, to-wit, Sections 3586 to and including 3589, Revised Codes of Montana, 1921. [97]

IV.

That although said bond was executed and delivered to said Chatterton & Son to be filed by them with the Commissioner of Agriculture of the State of Montana upon the issuance of a license by said Commissioner of Agriculture of the State of Montana authorizing said Chatterton & Son to engage in the business of warehousemen for the storage of grain in said State from said January 1st, 1930, to and including July 1st, 1930, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under and pursuant to the laws of the State of Montana relating to said warehousemen storing grain within said State, said bond was never delivered to nor filed with said Commissioner of Agriculture and/or State of Montana, nor was there any license issued to said Chatterton & Son to do business in the State of Montana as a warehouseman, or for any other purpose or at all, during the period of said bond.

V.

That thereafter and on or about the 10th day of July, 1930, said defendant made, executed and delivered to Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, extending said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "C", and by this reference made a part hereof.

VI.

That during the said period from July 1st, 1930, to and including the month of June, 1931, neither the said bond, nor the said continuing certificate had been or was filed with the Commissioner of Agriculture of the State of Montana, nor was the said Chatterton & Son issued any license to do business in the State of Montana as a warehouseman, or for any other purpose or at all.

VII.

That in the month of June or July, 1931, the exact date of which is to defendant unknown, and after said Chatterton & Son had failed and become insolvent, the said Commissioner of Agriculture of the State of Montana took possession of the business of said [98] Chatterton & Son at Billings, Montana, and did take from the office of said Chatterton & Son said bond and certificate of renewal, and did take and carry said bond and renewal certificate thereof back to the Capitol at Helena, Mon-

tana, and did then purport to file the same in the files of the office of the Commissioner of Agriculture of the State of Montana, at Helena, Montana, and attempt and purport to then issue an alleged license to said Chatterton & Son to do business in the State of Montana as warehousemen, all after said Chatterton & Son had failed and become insolvent and were no longer a going concern and were no longer operating or doing business in the State of Montana, as said Commissioner of Agriculture of the State of Montana then and there knew.

VIII.

That Sections 3589 and 3589-A, Revised Codes of Montana, 1921, provides expressly for the supervision, licensing and bonding of public warehousemen, and the rights and duties of said State of Montana and/or the Commissioner of Agriculture thereunder, conditioned upon the issuance of said license and filing of bond with the said Commissioner of Agriculture and/or the State of Montana under said Statutes, and that since said Chatterton & Son were never issued a license under and pursuant to said Acts and no bond was filed with said Commissioner of Agriculture and/or State of Montana as therein provided, the said State of Montana and/or Commissioner of Agriculture has no right, claim or authority under said Act or the laws of the State of Montana to make claim on this defendant or its said bond, or bring suit on said claim, or right of claim whatsoever.

And for its further and separate answer, this defendant avers:

I.

That the defendant, Fidelity and Deposit Company of Maryland, at all times herein or in said Amended complaint referred to, ever since said [99] times and now, was and is a corporation organized and existing under and by virtue of the laws of Maryland, engaged in the surety business, and was and is now conducting such business in the State of Montana.

II.

That at all times herein or in said Amended complaint referred to, Chatterton & Son was and is a corporation, organized under and by virtue of the laws of Michigan.

III.

That on or about the 7th day of January, 1930, upon application of Chatterton & Son, the defendant herein did make and execute for Chatterton & Son, under and pursuant to Section 3589, Revised Codes of Montana, 1921, a certain warehousemen's bond to cover the storage of grain, a true copy of which bond is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

IV.

That thereafter and on or about the 10th day of July, 1930, said defendant made and executed for

Chatterton & Son its certain continuation certificate of said bond hereinbefore referred to, purporting to extend said bond from July 1st, 1930, to July 1st, 1931, a true and correct copy of which certificate is hereto attached, marked Exhibit "C", and by this reference made a part hereof.

V.

That said bond and renewal thereof was and is a warehouseman's bond to cover the storage of grain pursuant to Section 3589 of the Revised Codes of Montana, 1921, conditioned upon the acts and duties enjoined upon grain warehousemen by the law and for the use and benefit of and to indemnify the owners of grain stored with said warehousemen against loss.

VI.

That Sections 3592-1 and Section 3592-2 of the Revised Codes of Montana, 1921, as amended by Chapter 50 of the Session Laws of [100] Montana of 1927, provides for the license and kind of bond to be furnished to the Commissioner of Agriculture of the State of Montana and/or the State of Montana by warehousemen handling agricultural seeds, beans, peas, as distinct from grain, etc., which is separate and distinct from the bond filed by the defendant herein and required under Section 3589 of the Revised Codes of Montana, 1921, and upon which said action herein is based.

VII.

That said claim herein is made upon said defendant by said State of Montana and Department of Agriculture of said State on behalf of owners of beans stored with said Chatterton & Son and not to indemnify owners of grain upon which said bond of said defendant and the liability thereunder was and is conditioned.

WHEREFORE, having fully answered said Amended complaint, said defendant prays:

1. That plaintiffs take nothing by their said Amended complaint;

2. That defendant be awarded its costs of suit herein expended.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant. [101]

State of Montana
County of Lewis and Clark.—ss.

HARRY P. BENNETT, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant, Fidelity and Deposit Company of Maryland, the corporation making the foregoing answer, and as such makes this verification for and on behalf of said corporation, for the reason that there is no officer of said defendant within the said County of Lewis and Clark aforesaid, wherein affiant re-

sides; that he has read said answer and knows the contents thereof, and the matters and things therein stated are true to the best of his knowledge, information and belief.

HARRY P. BENNETT

Subscribed and sworn to before me this 28th day of June, 1935.

[Notarial Seal] JOHN J. MITCHKE
Notary Public for the State of Montana, residing at Helena, Montana.
My commission expires May 1st, 1936.

[102]

EXHIBIT "A".

CONTRACT AND FIDELITY DEPARTMENTS
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
BALTIMORE

This application is to be used: (a) for all miscellaneous bonds handled in the Contract Department, such as financial guarantees, franchise and ordinance bonds, freight charge and delivery bonds, indemnity bonds, lease bonds, lenders' and mortgagees' bonds, license and permit bonds, lien bonds, workmen's compensation bonds, supply bonds, etc., BUT NOT FOR CONSTRUCTION BONDS: and (b) for miscellaneous bonds handled in Fidelity Department, such as warehousing, compress and internal revenue bonds, and bonds of consignees, brokers, agents, etc.

Full Name of Applicant—Chatterton and Son
(If Applicant is a Partnership, give Names of all partners; if a Corporation, give Names of all Officers)
Address—Lansing, Mich. Principal Office.....
If Corporation, give State and
year incorporated. State—Mich. Year.....

Amount of bond required,—$10,000.00. Effective from—January 7, 1930.
To whom given? Give exact title of individual, firm or corporation .....
State of Montana
.....
Address .....

State below fully the nature of the guarantee required, and transmit copies of all agreements or important papers pertinent to the bond applied for, as same will facilitate action on this application.
Public Warehouseman's bond
.....
to State of Montana
.....
STATEMENT OF ASSETS AND LIABILITIES AS OF .....
(Date)

If Corporation, give amount Capital authorized.....
Subscribed ..... Paid in .....

Cash in.....Bank———	Capital Stock, if a
(Name of Bank)	Corporation .....———
" .....Bank———	Mortgage Bonds, if a
(Name of Bank)	Corporation .....———
" .....Bank———	..... ———
(Name of Bank)	
Cash in office.....———	..... ———
Stocks, Bonds, etc.	Borrowed or due on
Market Value, Enu-	Stocks and Bonds.....———
merate .....———	(State which hypothecated)
..... ———	.....———

[103]

(2)

Real Estate. (Give location and description, and appraised value of each piece)———	Borrowed or due on Real Estate. (Give amount of mortgage on each piece).....———
1 .....———	1 .....———
2 .....———	2 .....———
3 .....———	3 .....———
4 .....———	4 .....———
5 .....———	5 .....———
Plant consisting of....———	Encumbrance on plant .....———
.....———	..... ———
.....———	Borrowed from banks. (How secured) .....———
.....———	From.....$——— due———
Stock of Supplies (State nature of same) .....———	From.....$——— due———
.....———	From.....$——— due———
.....———	..... ———
Notes Receivable. (State when due and how secured).....———	Notes Payable. (How secured) .....———
.....———	..... ———
Accounts Receivable. (Give dates when largest items are due) .....———	Accounts Payable. (Give dates when largest items are payable .....———
From.....$——— due———	To.....$——— due———
From.....$——— due———	To.....$——— due———
From.....$——— due———	To.....$——— due———
From.....$——— due———	To.....$——— due———
Other assets consisting of.....———	Other liabilities consisting of .....———
.....———	..... ———
Total Assets.....———	Total Liabilities....———

It is hereby agreed that the Depositories may confirm any inquiry made by the Company or its representatives

as to any statement made herein relative to moneys on deposit or borrowed money. [104]

1. State lines of business in which you are engaged and give particulars.....
2. Are there any law suits, judgments or liens pending against you?.....
3. Amount of liability as endorser or surety for others $————
4. Have you ever failed in business?.....
5. Have you arranged a bank loan for the purpose of handling this proposition?.....
   (yes or no)
   if so, state.....$————
   (Name of Bank) (Amount of Loan)

.....

(Date It Must Be Repaid) (Security Given Bank for Repayment)

6. If Applicant is an individual, just starting in business, or if he has been in business for himself less than five years, give names of former employers during the last 10 years, and state date of entering and date of leaving the service of such employers. (If more than one former employer, give this information in separate letter and attach same to this application) .....
7. If Applicant is a Warehouseman, state capacity of Warehouse or Elevator.....

GIVE BELOW THE NAMES AND ADDRESSES OF PERSONS OR CORPORATIONS ACQUAINTED WITH YOU IN A BUSINESS WAY

NAME	BUSINESS	CITY AND STREET ADDRESS

Please write names and addresses legibly.

The undersigned does or do hereby represent that the statements made herein as an inducement to the Fidelity and Deposit Company of Maryland (hereinafter called Company) to execute the bond applied for herein, are true, and, should the Company execute said bond, does or do hereby agree as follows: FIRST, to pay to the Company the premium charge of One Hundred and no/100 Dollars ($100.00) annually in advance on the 7th day of January, in each and every year, as long as liability shall continue under said bond, or any continuation or renewal thereof, or substitute therefor (said bond or any such continuation, renewal or substitute being hereinafter referred to as said bond), and until evidence satisfactory to the Company of the termination of such liability shall be furnished to it at its home office in the City of Baltimore; SECOND, to indemnify the Company against all loss, liability, costs, damages, attorneys' fees and expenses whatever, which the Company may sustain or incur by reason of executing said bond, in making any investigation on account thereof, in prosecuting or defending any action which may be brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; THIRD, that the Company shall have the right, and is hereby [105] authorized, but not required; (a) to adjust, settle or compromise any claim, demand, suit or judgment upon said bond, unless the undersigned shall request the Company to litigate such claim or demand or

defend such suit or to appeal from such judgment, and shall deposit with the Company collateral satisfactory to it in kind and amount; and (b) to fill up any blank or blanks left herein, and to correct any errors in filling up any such blank or blanks, it being hereby agreed that any such insertion or correction shall be prima facie correct; FOURTH, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, attorneys' fees and expenses, claims, demands, suits and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned in any claim or suit hereunder; FIFTH, to waive, and does or do hereby waive, all right to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; SIXTH, that the Company shall have the absolute right to cancel said bond in accordance with any cancellation provision therein contained, or to procure its release from said bond under any law for the release of sureties, and the Company is hereby released from any damages that may be sustained by the undersigned by reason of such cancelation or release; SEVENTH, that this obligation shall be for the benefit of any person or company that may join with the Company in executing said bond, or that may, at the request of the Company, exe-

cute said bond, and also for the benefit of any company or companies that may assume reinsurance upon said bond; EIGHTH, that separate suits may be brought to recover hereunder as causes of action shall accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising; NINTH, that nothing herein contained shall be construed to waive or abridge any right or remedy which the Company might have if this instrument were not executed; and TENTH, that the above agreements shall bind the undersigned and the heirs, executors, administrators, successors and assigns of the undersigned, jointly and severally.

Signed, sealed and dated this ..... day of ....., 19.....

IF INDIVIDUAL sign here:

Witness..... .....(SEAL)

IF CO-PARTNERSHIP, copartnership and all co-partners sign here:

Witness..... .....(SEAL)

.....(SEAL)
(Individually and as a co-partner)

.....(SEAL)
(Individually and as a co-partner)

.....(SEAL)
(Individually and as a co-partner)

IF CORPORATION sign here:

CHATTERTON AND SON,
(Name of Corporation)

By H. E. CHATTERTON
President.

Attest:
A. H. Madsen. [106]

EXHIBIT B.

[PRINTER'S NOTE: The Public Warehouseman's Bond #3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [107]

EXHIBIT "C".

[PRINTER'S NOTE: The Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

[Endorsed]: Filed July 1, 1935. [108]

Thereafter, on August 3, 1935, MOTION TO STRIKE FROM ANSWER was duly filed herein,

in the words and figures following, to wit: [109]

[Title of Court and Cause.]

MOTION TO STRIKE

Come now the plaintiffs in the above entitled action and move this Honorable Court to strike from the answer of the defendant on file herein, the affirmative defenses set up therein, that is to say, both of the further and separate answers therein set forth, upon the ground that the same and all the matters therein set forth are irrelevant and immaterial and constitute no defense or defenses to the cause of action set forth in the amended complaint herein and in no way tend to defeat recovery thereon.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assist. Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 3rd, 1935. [110]

Thereafter on Aug. 3, 1935, NOTICE of Motion to Strike was filed herein, in the words and figures following, to wit: [111]

[Title of Court and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the foregoing motion and move the Court in conformity therewith at the courtroom of said Court in the Federal Building at Billings, Montana, on the first day that the said Court is sitting and holding Court at Billings, Montana, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

The said motion is made upon the files and records in said cause.

Dated this 18th day of July, 1935.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs

Service of the foregoing Notice and Motion to Strike and receipt of a true copy thereof is hereby acknowledged the 24th day of July, 1935.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Defendant.

[Endorsed]: Filed Aug. 3rd, 1935. [112]

Thereafter, on August 3, 1935, STIPULATION to submit Motion to Strike was filed herein, as follows, to wit: [113]

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY MUTUALLY STIPULATED AND AGREED BY and between counsel for the respective parties above named that the written motion of the above named plaintiffs to strike certain portions of defendant's answer in the above case may be considered as having been properly and regularly made in open Court, waiving any notice thereof, and that the same be submitted to the Court without argument, to be passed upon and disposed of by the Court at any time at chambers and its order so made and entered to be as effective and binding as though made in open Court after notice and hearing.

Dated this 24th day of July, 1935.

R. G. WIGGENHORN
Attorney for Plaintiffs
T. B. WEIR &
HARRY P. BENNETT
Attorneys for Defendant.

[Endorsed]: Filed August 3, 1935. [114]

Thereafter, on December 30th, 1935, ORDER of the Court granting Motion to Strike was duly entered herein as follows, to wit: [115]

[Title of Court and Cause.]

ORDER OF COURT GRANTING MOTION TO STRIKE.

Endorsed on cover of Motion.

The within motion to strike came to the attention of this Court through Stipulation of Counsel submitting it; having considered the same and the answers of defendant it appears that both of the further and separate answers contained in the latter should be eliminated as not constituting a defense to the amended complaint. It is therefore the opinion of the Court that the aforesaid motion to strike should be granted, and it is so ordered.

CHARLES N. PRAY
Judge

[Endorsed]: Entered Dec. 30th 1935. [116]

Thereafter, on January 18th, 1936, Defendant's BILL OF EXCEPTIONS was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [117]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 4th day of March, 1935, the plaintiff in this cause filed in the District Court of the United States for the District of Montana, Billings Division, its amended complaint, as follows:

[PRINTER'S NOTE: Amended Complaint in Equity here set forth in the typewritten record is already set forth in the printed record at pages 54-67, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [118]

That thereafter on the 1st day of July, 1935, there was duly filed therein the defendant's answer to the plaintiffs' amended complaint, as follows:

[PRINTER'S NOTE: Answer filed July 1, 1935, here set forth in the typewritten record is already set forth in the printed record at pages 78-102, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [128]

That thereafter on the 3rd day of August, 1935, there was filed by the plaintiffs in the above cause a written notice of motion to strike, as follows:

[Title of Court and Cause.]

NOTICE OF MOTION.

To the above named Defendant and to T. B. Weir and Harry P. Bennett, its Attorneys:

You and each of you will please take notice that the above named plaintiffs will present the foregoing motion and move the Court in conformity therewith at the courtroom of said Court in the Federal Building at Billings, Montana, on the first day that the said Court is sitting and holding Court

at Billings, Montana, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

The said motion is made upon the files and records in said cause.

Dated this 18th day of July, 1935.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs."

That thereafter on the 3rd day of August, 1935, there was made by plaintiffs in the above cause a written motion to strike, as follows:

"[Title of Court and Cause]

MOTION TO STRIKE.

Come now the plaintiffs in the above entitled action and move this Honorable Court to strike from the answer of the defendant on file herein, the affirmative defenses set up therein, that is to say, both of the further and separate answers therein set forth, upon the ground that the same and all the matters therein set forth are irrelevant and immaterial and constitute no defense or defenses to [146] the cause of action set forth in the

amended complaint herein and in no way tend to defeat recovery thereon.

RAYMOND T. NAGLE
Attorney General
ENOR K. MATSON
Assistant Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs."

That thereafter on the 3rd day of August, 1935, there was made in the above cause a written stipulation, as follows:

"[Title of Court and Cause]

STIPULATION.

IT IS HEREBY MUTUALLY STIPULATED AND AGREED by and between counsel for the respective parties above named that the written motion of the above named plaintiffs to strike certain portions of defendant's answer in the above case may be considered as having been properly and regularly made in open Court, waiving any notice thereof, and that the same be submitted to the Court without argument, to be passed upon and disposed of by the Court at any time at chambers and its order so made and entered to be as

effective and binding as though made in open Court after notice and hearing.

Dated this 24th day of July, 1935.

R. G. WIGGENHORN
Attorney for Plaintiffs
T. B. WEIR,
HARRY P. BENNETT
Attorneys for Defendant."

That thereafter the Court did, on December 30th, 1935, make the following order on the above motion, as follows:

"The within motion to strike came to the attention of the court through stipulation of counsel submitting it; having considered the same and the answer of defendant it appears that both of the further and separate answers contained in the latter should be [147] eliminated as not constituting a defense to the amended complaint. It is therefore the opinion of the court that the aforesaid motion to strike should be granted, and it is so ordered.

CHARLES N. PRAY,
Judge."

which order sustains the motion of plaintiffs and to which the defendant excepts and now presents this, its Bill of Exceptions, and asks that the same be allowed and settled.

WEIR, CLIFT, GLOVER
& BENNETT
Attorneys for the Defendant. [148]

The undersigned attorneys, for and on behalf of plaintiffs in the above entitled case, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 18th day of January, 1936, and having examined the same, do agree that the same is true and correct and that the same may be allowed, settled, signed and filed and made a part of the record in said cause, and do hereby waive the right to be present at the settling and allowance of said Bill of Exceptions.

R. G. WIGGENHORN
Attorneys for Plaintiffs.

IT IS HEREBY ORDERED that the above and foregoing be, and the same is, herewith duly signed, certified and allowed as the Bill of Exceptions in said cause and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 18th day of January, A. D., 1936.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Jan. 18, 1936. [149]

Thereafter, on January 28th, 1936, STIPULATION WAIVING TRIAL BY JURY was filed herein as follows, to wit: [150]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties to the above entitled action that the said action shall be tried to the Court without a jury, and that a jury therein is expressly waived.

Dated at Billings, Montana, this 28th day of January, 1936.

ENOR K. MATSON
Assistant Attorney General, State of Montana.
R. G. WIGGENHORN
Attorneys for Plaintiffs.
WEIR, CLIFT, GLOVER
& BENNETT
Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1936. [151]

Thereafter, on Jan. 28th, 1936, STIPULATION TO AMEND ANSWER to Amended Complaint was filed herein as follows, to wit: [152]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs above named, through their attorneys, Ralph G. Wiggen-

horn and Enor K. Matson, and the defendant, through its attorneys, Weir, Clift, Glover & Bennett, that defendant may amend its answer to the Amended Complaint by the insertion of the following clause on page 8, line 1, after the word "complaint".

"And for its further and separate answer this defendant avers:

That the said Amended Complaint herein is barred by laches and is also barred under and pursuant to the Statute of Limitations of the State of Montana, to-wit, Sections 9032 and 9033 of the Revised Codes of Montana, 1921."

Dated this 28th day of January, 1936.

ENOR K. MATSON
Assist. Attorney General
R. G. WIGGENHORN
Attorneys for Plaintiffs.
WEIR, CLIFT, GLOVER
& BENNETT.
Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1936. [153]

Thereafter, on September 10th, 1936, the DECISION OF THE COURT was duly given and filed herein in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No. 917.

THE STATE OF MONTANA, et al,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Defendant.

DECISION.

This is an action to recover the sum of ten thousand dollars, named as the penalty of a surety bond issued by the defendant corporation, a surety company. The complaint also seeks the reformation of said bond by changing the word "grain", printed therein, to the word "beans".

Counsel for plaintiffs have made a fair statement of the case which the court will adopt with some modification. From August, 1929 to July, 1931, the warehouse of Chatterton & Son at Billings, Montana was operated as a branch house of the said firm, through its manager, R. J. Healow, for the storage of beans only. Each owner's beans was stored separately and marked for identification so that the same beans could be returned to him. The bond was taken out through the home office of Chatterton & Son at Lansing, Michigan, and was received by the manager at Billings, Montana, January, 1930, and the continuation certificate shortly

after its date which was July, 1930. The bond on May 12, 1931, and the continuation certificate on July 21, 1931, were both transmitted to the Commissioner of Agriculture of the State of Montana. The defendant through its agents admit that the bond as issued and through its continuation certificate was in force from January 7th, 1930 to July 1st, 1931. It was during this period that the 1930 crop of beans was received and stored in the Chatterton warehouse. [154]

The bond was written upon a printed form furnished by the Commissioner of Agriculture. On December 6th, 1930, the defendant company by an instrument in writing under seal, acknowledged that the bond was effective and that it was surety upon the bond. 39,897 sacks of beans of 100 pounds each were stored in the warehouse at Billings by 130 bean growers during the fall and winter of 1930. A warehouse receipt was issued by Chatterton & Son to each individual grower calling for delivery of the identical beans so stored to the holder of the receipt. That from September, 1930, to June, 1931, all but 12,000 sacks of said beans were shipped by Chatterton & Son from the Billings warehouse to a warehouse operated by said firm at Kansas City, Missouri, and on or about July 13th, 1931, the remaining 12,000 sacks were shipped by above firm from the Billings warehouse to their said warehouse at Kansas City, Missouri. That the identity of said beans so stored in said Billings warehouse was not preserved and the rights

and title of the owners of the beans was not honored, but the beans were, from the beginning treated by Chatterton & Son as their own, and when received in Kansas City were by Chatterton & Son sold and disposed of and the proceeds kept and not accounted for, all without the knowledge of any of the owners. That when the beans were shipped from the Billings warehouse as aforesaid, they were shipped by Chatterton & Son with the intention of disposing of them and converting them, without the consent of the owners.

That none of the owners of the beans discovered that they had been shipped and so disposed of until a few days after July 13, 1931, after the last of the beans had been shipped from the Billings warehouse. That the owners thereupon endeavored to pursue their said beans but were able to find only about 10,000 sacks, all of which had been hypothecated by Chatterton & Son and were encumbered, and all of which had been commingled and their identity could not be determined and they could not be recovered for the owners. That all marketable beans, in the nature of the business, are seed beans and [155] there are no seed beans or bean seed as such, beans being ordinarily selected for planting from any good marketable beans of the owner. When the Billings warehouse was emptied of its beans on July 13, 1931, the warehouse was closed and Chatterton & Son ceased to do business. That immediately upon discovering the defalcation of said Chatterton & Son and the loss of said beans,

demand was made by the bean growers or their representative upon Chatterton & Son for the return of said beans and honoring of said warehouse receipts or an accounting for their value, which demand was not honored and Chatterton & Son wholly failed and refused to account for any of said beans.

That after giving credit for all advances made against such stored beans and all other charges against the same, the total value of all the various lots of beans so converted by Chatterton & Son, as of the date of conversion, that is to say the date of shipment of said beans from said Billings warehouse, was the sum of $65,843.57, which represents the total loss of the said bean growers by reason of the said wrongful acts of said Chatterton & Son in appropriating and converting said beans and failing to perform their legal duty as a warehouseman and bailee. That the total value of all said stored beans as of the date of the closing of said warehouse at Billings in July 1931, at the market price then prevailing, excluding all those lots of beans against which there had been advanced as much or more than the then prevailing market price, after allowing credit for all advances made against them and allowing all other proper credits, was the sum of $37,260.76. The total amount recovered on behalf of the bean owners and warehouse receipt holders, recovered from Chatterton & Son from the remaining equity in 10,000 sacks of beans left unsold, cash, accounts, bills receivable and other

assets, is the sum of $26,400.00, against which is chargeable approximately $3,000.00 for expenses incurred in pursuit of the beans and making said recoveries, leaving a net credit against the said losses above indicated, in the sum of $23,400.00. That the net loss remaining to [156] the bean owners and suffered by them, by reason of the defalcation of the said Chatterton & Son, reckoned upon any legal theory, is far in excess of $10,000.00, the amount of said bond. That said loss was suffered and said cause of action accrued and the defendant became liable for the penalty of said bond when the warehouse at Billings was closed in July 1931, whereby the said breach occurred, and the defendant has been liable for the payment thereon, under its bond, since July 1931, and the same is subject to interest accordingly. That demand was promptly made upon defendant to pay and discharge its said obligation under said bond, and the same has been refused.

That all of the assets of Chatterton & Son and of its successor, Chatterton & Son, Inc., that were available and that could be reached, were paid over to the said bean owners as aforesaid, and the assets of said companies have become exhausted. That prior to the closing of said warehouse in July 1931, Chatterton & Son went in receivership and said Chatterton & Son became and is dissolved by decree of dissolution of the District Court in the State of Michigan, and since has not been an existing corporation. That a creditor's claim was filed

on behalf of said bean growers with the receiver of the assets of said Chatterton & Son, but that no recovery has been had thereon and there are no longer any assets available and no recovery can be had. That the said Chatterton & Son Inc., delivered over all of its assets, as aforesaid, to the said bean growers, and thereafter ceased to do business and has since not been a going concern. That all recourse against either Chatterton & Son or Chatterton & Son Inc., on behalf of said bean growers, has been exhausted.

The agent of the defendant company through whom this bond was negotiated and procured knew, at the time said bond was given, that Chatterton & Son were engaged exclusively in the bean business at its Billings branch and that it operated a warehouse there exclusively for the storage of beans; that said agent was and for a long time had been intimately acquainted with the nature of the business of Chatterton & Son because of long standing and intimate friendship [157] and business association with the president and other principal officers of Chatterton & Son (transcript pp. 74-79, Chatterton's deposition.)

The bond names the State of Montana as obligee "for the benefit of all parties concerned." The condition of the bond is that "Chatterton & Son shall indemnify the owners of grain stored in said warehouse against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the

State of Montana and the regulations of the Department of Agriculture."

As it appears to the court from the testimony and circumstances of the case the bond was intended to indemnify, in case of loss, the owners of beans stored in the public warehouse of Chatterton & Son at Billings, and no question seems to have been raised at the time of issuance of this printed form of grain bond as to its inapplicability to the commodity in question, or at the time of the issuance of the certificate of continuance, and on both occasions the premium was paid and accepted by the company. In the meantime the above firm through its manager at Billings let it be known to the bean growers generally that a bond had been furnished for the protection of those who stored their beans with this firm.

Plaintiffs sue for recovery upon the common law liability under the bond, claiming that, while it appears under the definition they cited referring to beans generally as agricultural seed, governed by the Agricultural Seed Act providing for bond and license, such regulations are not controlling under the cause of action here relied upon (Session Laws, Montana, 1927, Chapter 50, Section 4). That they seek recovery under the plain language of the bond, whether or not required by statute, which was procured for the purpose of affording protection to the bean owners of the Billings district, and to insure the safety of their deposits in this warehouse.

In 85 Mont. 149, Montana Auto Finance Corporation v. Federal Surety Co., the court said: "The universal rule is that in construing the bond of a surety company, acting for compensation, the contract [158] is construed most strongly against the surety, and in favor of the indemnity which the obligee has reasonable grounds to expect. Such contracts are generally regarded as contracts of insurance, and are construed most strictly against the surety." Without question that is the law and many authorities of like tenor are to be found. Such companies can not expect to take premiums and incur risks, and thereafter avoid them under the rule of strict issimi juris, and perhaps on grounds having no relation to the risk assumed, and on contracts of indemnity prepared by themselves.

It is a general principle of law that an insurer is charged with knowledge of the business of the warehouseman insured; that if the warehouseman may be held liable on the bond, the surety also is liable thereon; and such liability extends to any act of conversion on the part of the warehouseman. Here the agent had actual knowledge of the business of Chatterton & Son. Indemnity Ins. Co. of No. Am. v. Archibald (Tex) 299 S. W. 34; 67 C. J. 459, 460. In Commercial Casualty Ins. Co. v. Lawhead, 62 Fed. (2) 928, a bond was given to indemnify plaintiff against the loss of $20,000.00 deposited in a bank on a time certificate of deposit. Through mistake the wrong printed form of bond was used

which covered a deposit of $20,000.00 subject to check. The lower court held that the condition of the bond did not cover the loss, which was reversed on appeal, wherein the court said that if the bond did not secure the deposit in question then the defendant received a premium for nothing; that no doubt the parties understood the bond guaranteed the specific deposit; that the printed form used was apparently not appropriate to express the true purpose, and that the bonding company should not be allowed to escape liability because of it.

Plaintiffs reply upon the common law liability of sureties and have cited many authorities to sustain them under the facts presented in this case. The general rule is stated in 9 C. J. 27: "A statutory bond may be good as a common law obligation, although insufficient [159] under the statute because of non compliance with its requirements, provided it is entered into voluntarily and on a valid consideration and does not violate public policy or contravene any statute. But this rule can not be extended to cases in which to hold the parties liable as on a bond at common law would be to charge them with liabilities and obligations greater than, or different from, those which they assumed in the instruments executed by them. Moreover, in order to uphold a bond as a valid common-law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed." Again in Pue v. Wheeler, 78 Mont. 516, the defense was

failure of consideration in this, that the bond was not filed with the clerk and was not in statutory form. In that case the court held: "If not good as a statutory undertaking, it is good as a common-law bond, to be measured by the plain wording of its terms. * * * Irregularities of procedure do not invalidate it. * * * There is no merit in the contention of lack of consideration. Defendants got that for which they executed the undertaking, return to attachment debtor of his property, and they may not complain of lack of consideration." Also see American Surety Co. v. Butler, 86 Mont. 584; State to use of Benton County v. Wood, (Ark.) 10 S. W. 599.

There seems to be no question that this action could be brought in the name of the State under the statute and authorities cited. Sec. 9067 Mont. Codes; County of Wheatland v. Van, 64 Mont. 113; 20 R. C. L. 665, 667; 47 C. J. 26. As the facts appear can it be said that there exists a real necessity for reforming this bond; the parties knew what commodity was intended to be covered and used the printed form contain the word "grain" to carry out their intention of insuring beans.

It does seem that a fair interpretation of the word "grain" should include beans under the testimony and circumstances surrounding the case, such for instance as the known fact that this warehouse was solely for the storage of beans. In Webster's New International [160] Dictionary the word "grain" is defined as follows: "a single small hard

seed.—collectively: a. The unhusked or the threshed seeds or fruits of various food plants, now usually, specif. the cereal grasses, but in commercial and statutory usage (as in insurance policies, trade lists, etc.) also flax, peas, sugar cane seed, etc." It does not seem unlikely that the author would have included the word "beans" following the word "peas" if it had occurred to him at the time, and he would doubtless agree that the "etc." in his definition included beans. However, in order to avoid any question as to the correct definition of the word and what it might finally be held to include, the court is of the opinion that the bond should be reformed and the word "beans" inserted therein in place of the word "grain", so that the intention of the parties may be plainly expressed in the bond, and such is the order of the court.

It should appear quite evident from the foregoing that in the opinion of the court judgment for the full amount of the bond should be awarded the plaintiffs with their costs in this behalf expended, and it is so ordered.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed September 10, 1936. [161]

Thereafter, on September 19th, 1936, JUDGMENT was duly entered herein, as follows, to wit: [162]

In the District Court of the United States, Billings Division.

THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana,

Plaintiffs,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Defendant.

JUDGMENT.

This cause came on to be heard on the 28th day of January, 1936, and was argued by counsel; and thereupon upon consideration thereof it was ordered, adjudged and decreed, and is now ordered, adjudged and decreed, as follows, viz:

1. That the bond which is the subject of this action be and hereby is reformed by changing and substituting for the word "grain" where it appears in said bond in the condition thereof, the word "beans".

2. That the plaintiffs do have and recover of and from the defendant the sum of Thirteen Thousand One Hundred and 00/100 Dollars ($13,100.00), lawful money of the United States of America, as

the amount of said bond with interest thereon at the rate of six per cent per annum from July 15, 1931, to the date hereof; with interest upon said sum from the date hereof at the rate of six per cent per annum.

3. That the plaintiffs recover from the defendant their costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor. Costs $169.60.

Judgment entered this 19th day of September, 1936.

CHARLES N. PRAY.
Judge of the above-entitled court.

[Endorsed]: Filed and entered Sept. 19th, 1936. [163]

Thereafter, on November 30th, 1936, the Defendant's BILL OF EXCEPTIONS was duly signed, settled, allowed and filed herein, in the words and figures following, to wit: [164]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED That this cause came on regularly for trial on the 28th day of January, 1936, at Billings, Montana, before Hon. Charles N. Pray, one of the Judges of the above entitled Court, sitting without a jury; trial by jury having been waived by stipulation of counsel. R. G. Wiggenhorn, Esq., of Billings, Montana, appeared as coun-

sel for the plaintiffs. E. K. Matson, Assistant Attorney General of the State of Montana, appeared for the State of Montana, and Harry P. Bennett, Esq., of Helena, Montana, appeared for the defendant. Upon agreement of counsel, certain amendments were made to the pleadings in the case; whereupon, the following proceedings were had:

(Opening statement by Mr. Wiggenhorn.)

(Opening statement by Mr. Bennett.)

R. J. HEALOW,

a witness called for the plaintiff, being first duly sworn, testified as follows:

(Thereupon, at the request of Mr. Wiggenhorn, exhibits for the plaintiff were marked for identification "No. 1" to "No. 18", inclusive.) [165]

My name is R. J. Healow.

Mr. BENNETT: Just a moment, if the Court please; at this point, for the purpose of the record the defendant objects to the introduction of any testimony on the ground and for the reason that the complaint fails to state a cause of action, either in law or in equity, against this defendant; on the further ground that there is a defect in the parties, both plaintiff and defendant.

The COURT: I will overrule the objection.

Mr. BENNETT: Note an exception, please.

(Testimony of R. J. Healow.)

DIRECT EXAMINATION

by Mr. WIGGENHORN.

I live here at Billings and I was local manager for Chatterton & Son from the fall, August, 1929, to July, 1931, which involved two crops. Their business was the bean business, no other business in Montana. They had a warehouse here which was used for the storage of nothing but beans, and I was the manager. I had been in the bean and bean storage business for about eight years previous to the time that I was employed by Chatterton & Son. I had been warehousing beans for the Idaho Bean and Elevator Company here in Billings. I was manager of their bean business and warehouse. I thought I knew about the bean business.

The general nature of the business of Chatterton & Son was beans entirely in Montana, and also in Kansas City. They also conducted a jobbing business, or purchased beans. We bought and cleaned beans and also stored beans and issued warehouse receipts for the beans we stored. Plaintiff's "Exhibit 4" is the printed form of warehouse receipt used by me during the time Chatterton & Son was in business here.

(Plaintiff's Exhibit 4 offered and received in evidence without objection.) [166]

(Testimony of R. J. Healow.)

EXHIBIT 4.

NEGOTIABLE WAREHOUSE RECEIPT

License No..... No.....

Date.....

RECEIVED from.....

..... Sacks Beans for Storage at.....

Gross. Wt..... Storage and Insurance 2c per cwt.
Sack Wt..... per month or fractional part thereof.
% tare..... In event beans are purchased by
Net. Wt..... other than the undersigned a hand-
Value Cwt..... ling charge of 5c per cwt. shall be collected. All weights are subject to natural shrinkage. Delivery to holders of Receipts shall be as provided by the Laws of Montana. Beans insured for benefit of owner.

CHATTERTON & SON

By .....

That was the printed form used by me during the time the company was engaged in business here.

The beans which are stored are kept segregated from the time they are taken in. Then they are cleaned and piled back in separate piles with a tag attached somewhere to the pile showing the number of sacks, the grade and the owners. Each individual's sacks, regardless of the number there may be, are kept piled up and kept separately during the time they are stored. It is a common practice, done in all warehouses; in fact, the growers de-

manded it. It is generally understood in the trade that that is done.

After the beans are milled they are tested. By mill, I mean cleaned or run through the mill. Then they are tested out to determine the number of discolored or unmarketable beans, and, depending on the number of discolored or off-grade beans, the grades are determined as ninety-eights, ninety-sevens or ninety-sixes, or whatever they may be. By that I mean so much per cent of the entire lot. That means a bean that grades 96% of perfect; the other 4% represents discolor or foreign material. To grade the beans, you draw off a small amount of beans from, say, every fifth sack or so in a pile, all through the pile, and after you pick those, you determine [167] the percentage of good beans. "Picking beans" means picking out the discolored beans, by a method of running them over a small picker, as we call it, and women pick out these discolored beans.

Beans have a market quotation, or market quotations from day to day. They have a market price for each grade of beans. There are about four grades. They will sell ninety-eight beans, a ninety-seven, a ninety-six, and down to a ninety-five, sometimes. It depends upon the year, and the price ranges accordingly. As a rule they require mostly ninety-sixes and ninety-eights. There are very few beans sold under that grade. If they grade less than 96%, they have to be hand-picked in order

(Testimony of R. J. Healow.)

to render them marketable. Ten cents a pound is the regular charge for picking the discolored beans that are taken out. If out of one sack of 100 pounds of beans, seven pounds are picked out—(in other words, classifying them as a 93% grade) at 10c a pound, 70c is charged against the market price for that day. That would then render the remaining beans as number one grade beans, and if the market price is $3 on a given day and the beans grade ninety-three, or seven pounds are actually taken out, the net market value of the remaining beans would be $2.30.

A bond was obtained for this warehouse conducted here by me. Soon after I became manager over here, I asked the Lansing office to procure a bond for the protection of the growers. That would be in the fall of 1929. The bond was issued in the early winter of 1930, about January. Plaintiff's "Exhibit 2" is the bond I now refer to. After taking the managership, I requested the Lansing office to procure a bond. I had for years previously always operated under a bond, and they replied that they would get it. That was the last I heard of it for a long time. Of course, in discussing with them many times from Kansas City and occasionally from Michigan, [168] they maintained that they would or did secure a bond as requested.

The bond came into my possession here at the Billings office some time during the winter or spring of 1930. That bond ran to July, 1930. Plaintiff's

(Testimony of R. J. Healow.)

"Exhibit 3", which purports to be a continuation certificate of the same bonding company, continuing that bond in force for a year from July 1930 to July 1931, came into my possession shortly after the date that it bears, July 30.

Neither of these instruments was promptly filed with the Commissioner of Agriculture. The only explanation I have for this is that the bonding and business of that nature was conducted from the Lansing office, and I do not recollect of having any reason for them being returned to our office here.

Mr. WIGGENHORN: I offer Plaintiff's Exhibit 2 in evidence.

Mr. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with the Secretary of Agriculture or any other department of the State of Montana.

The COURT: I suppose some proof with reference to that will come later?

Mr. WIGGENHORN: Yes, Your Honor.

The COURT: As to what was done with it?

Mr. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

The COURT: Promptly?

Mr. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in fact,

(Testimony of R. J. Healow.)

after the beans were deposited, with the Commissioner. In the orderly proof we will present that. [169]

The COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

[PRINTER'S NOTE: Exhibit 2—Public Warehouseman's Bond, No. 3591931 here set forth in the typewritten transcript is already set forth in this printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [170]

Mr. WIGGENHORN: We likewise offer Plaintiff's Exhibit 3.

Mr. BENNETT: Of course, we admit that that was executed, Your Honor; and without repeating objection, I merely want to repeat the objection is made to the original bond as going to the renewal certificate.

The COURT: And this will also be received and considered, subject to your objection.

EXHIBIT 3.

[PRINTER'S NOTE: Exhibit 3—Continuation Certificate No. 5809 here set forth in the typewritten transcript is already set forth in this printed record at pages 16-17, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

(Testimony of R. J. Healow.)

Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond? [171]

Mr. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any manner and not shown to have been made in the presence of any of the parties to this action.

The COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and that their product would be secure, if stored there.

Mr. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

The COURT: Yes, I will overrule the objection.

Mr. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to the growers in this territory. It would apply to anyone who asked me.

Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse? [172]

Mr. BENNETT: Just a moment; we make the same objection, and on the ground of it being hear-

(Testimony of R. J. Healow.)

say testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

The COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did. We are referring to the fall of 1930. When the bond was received by me, I imagine that I opened it and looked at it. I did not notice whether it pretended to cover "grain" or "beans." I just recognized it as being a bond.

I will explain the change that took place in the corporate nature of the business here. I am referring now to the change from Chatterton and Son to Chatterton and Son, Inc.

(It was here stipulated by counsel that Chatterton and Son changed its name to Chatterton and Son, Inc., on or about December 6, 1930 in its Kansas City branch and including the Billings branch; and also that Chatterton and Son of Lansing, Michigan, went into receivership in the fall of 1930.)

With respect to this change just stipulated to, it was made known to the growers here at Billings. It was discussed generally, and it was known. The name on the warehouse was not changed. The form of the warehouse receipt which you see signed "Chatterton and Son" was not changed. Our stationery was not changed. The only thing that

(Testimony of R. J. Healow.)

the owners of stored beans, that any change had taken place would be the rumor that that thing had been done. I don't know that the [173] rumor was prevalent or had been communicated to them. I don't remember telling any of them, but I would not be surprised if I did, but I can't remember any exact instance.

Plaintiff's Exhibit 8 is a letter written by me to the Commissioner of Agriculture of Montana. That is the letter in which the bond, Plaintiff's Exhibit 2, was transmitted to the Commissioner of Agriculture. I had always thought that it was filed, and when I discovered that it was not, I immediately sent it to the Commissioner of Agriculture. That was on or about May 12, 1931, and it has been there ever since, as far as I know.

Plaintiff's Exhibit 16 is the letter by which I transmitted Plaintiff's Exhibit 3, the continuation certificate, to the Commissioner. Apparently it had been mailed to me some time just previous to that, and this continuation certificate was mailed at this date to the Commissioner of Agriculture. I found it in my files just at this time. In this letter I said, "This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office." That is a fact.

In Plaintiff's Exhibit 8, my letter again written to the Commissioner, I made reference to a letter just received from Dyer-Jenison-Barry Company, the agent for the Fidelity and Deposit Company of

(Testimony of R. J. Healow.)

Maryland, and enclosed a copy of that letter for the information of the Commissioner, and the next page of the exhibit purports to be a copy of that letter. That is the copy referred to in Plaintiff's Exhibit 8. It was received by me in turn from the Dyer-Jenison-Barry Company, and I transmitted it to the Commissioner.

Beans were deposited for storage by me in the fall of 1930 and the early part of 1931 in the warehouse here at Billings. The storage commenced in the month of September, 1930. They were in [174] individual lots. I kept a record showing the beans and the owners, quantity, grade, and whatever information was needed with respect to the individual beans thus stored, and those records were permanent records in my office, such that they were there when in July of the following year the warehouse was closed and taken over by the Commissioner.

As to what happened to the beans that were stored, from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders I shipped them from time to time. When I say "beans", I mean beans belonging to those various owners who had stored them. Usually consent was obtained from the growers before shipment. The manner in which consent would be obtained would be as follows: If we would be crowded for room over there, and we had a federal bonded warehouse at Kansas City and it was represented to them that

they were just as safe there in a federal bonded warehouse as they were here, and there was no objection raised in some cases; but it was not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent.

Shipments were made all the way from October to June of the following year, from October 1930 to June 1931. I kept in my records likewise the dates of those shipments as they were made. It would all be available in my records, which were afterwards turned over to Mr. Lindsay, the accountant. I helped him make that accounting, giving him the benefit of my knowledge.

A warehouse receipt was issued for each one of these lots of beans received from the growers. As manager, I had access to market prices and kept informed on market prices from day to day, and particularly on the dates of shipments. These market prices were in truth the market prices for those days. My records also establish these prices. [175]

I have had about ten years' experience in the bean business. We got the market from Kansas City by wire or telephone; by that I mean our Kansas City main office. Chatterton and Son maintained a terminal warehouse there. They had access to the markets and could determine the exact market quoted for that day. I got that information by wire from that office, or by telephone. I kept in constant touch and communication so that I would

(Testimony of R. J. Healow.)

be informed of the market price. It was necessary that I know that to be informed on my buying.

The market price when the season first opened in September 1930 was slightly above 5c a pound, or about $5 a sack. There are 100 pounds in a sack. The price declined thereafter steadily, clear down to the spring of 1931. When this warehouse was closed in the spring of 1931, the price was about $2.25 a hundred for cleaned beans. The differential between the number one, or 98% bean, and the number two, or 96% bean, was 20c or 25c a hundred.

In July 1931 I was relieved of the management by orders of Chatterton and Son of Kansas City. An auditor from Kansas City relieved me. His name was Calkins. They took over all the books and bank accounts, the signing of the checks and the management in general. I was relieved entirely about the second of July.

There were about 12,000 sacks of beans on hand at that time. They shipped them out to Kansas City just as fast as they could load them, and even loaded at night, until they were all loaded. There were a few cull beans and stuff of that kind left here. None of the growers could have learned that those beans were being shipped in this hasty manner until they were gone. The cars were ordered without my knowledge, or the knowledge of anyone that had been connected here. They asked me to go to Hysham and Miles City to [176] close up a

couple of small deals that they had down there, and while I was gone they loaded these all out. It took about two days and a night to load out these 12,000 sacks.

My records also show the advances, if any, that were made against some of these beans. In some cases advances were made and in others, none.

I do not know what was done with the beans after they arrived in Kansas City.

The growers assembled shortly after they were notified that the beans had been shipped out. I conveyed such information to them. As soon as I learned they were gone, I went to three or four growers and telephoned others. There was a meeting after that. We were not able to deliver in Billings the beans represented by the warehouse receipts after they had gone out.

I engaged in the bean business after closing this warehouse. I have been and probably still am conversant with the bean business and market price of beans. About $2.80, I think, is the highest market we have had on number one beans since July 1931. That was about a year ago, in September 1934.

After the beans were shipped to Kansas City I do not know what disposition was made of them. None of the owners of the beans ever authorized me or the company, or consented to the sale or other disposition of the beans after they were shipped. As the manager of this company, I was the only

(Testimony of R. J. Healow.)

person with whom these growers or owners could deal with respect to their beans. To my knowledge, none of the growers or owners ever authorized in any other manner, or consented to the sale or the disposition of the beans after they reached Kansas City.

Any good number one bean is o.k. to use for seed purposes. They usually want *to selected* from a lot that has been heavy [177] producers and a good, clear, marketable bean. Any good marketable bean can be used for a seed bean. There are no seed beans as such in a separate category.

CROSS EXAMINATION

By Mr. BENNETT.

I engaged in the bean business in 1929. I started to work for Chatterton and Son in 1929. I was their manager in Montana. We bought some in Wyoming. The buyers in the Wyoming district were under my supervision. Prior to my coming with Chatterton and Son, I had been engaged in a similar line of business with the Idaho Bean and Elevator Company, operating in this territory. Outside of this Idaho company, I did not work for any other company as manager of their warehouse. I had previously gotten bonds in a similar line of business, for this Idaho company.

Q. And did you at any time during your work for any companies other than Chatterton and Son

(Testimony of R. J. Healow.)

ever make application for license to do business as a public warehouseman?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Wasn't that stricken out of the pleadings; wasn't that set up in a separate and distinct answer that I sustained a motion to?

Mr. WIGGENHORN: That is correct.

The COURT: Well, I will sustain the objection.

Mr. BENNETT: Note an exception.

Q. Will you state, if you know, Mr. Healow, whether or not you made application in the State of Wyoming for Chatterton and Son to do business under the laws of the State of Wyoming?

Mr. WIGGENHORN: The same objection, immaterial.

The COURT: The same ruling. [178]

Mr. BENNETT: Note an exception. If the Court please, I was just following this as a matter of clearing myself on this. This man testified that he asked for Chatterton and Son to secure a bond because it had been his practice in the past, and I wanted to ask him about that, where and when he had done that.

The COURT: Yes. Well, you have. He said he got a bond for a certain purpose.

When I came to work for Chatterton and Son, I was not familiar with their business outside Montana. In 1929, or after 1929, I did not buy any hay,

(Testimony of R. J. Healow.)

grain or other products on behalf of Chatterton and Son.

We got some of our stationery from Kansas City and had some of it printed here. In the year 1929 I did not hold myself out as Chatterton and Son by letters or advertisements to show that we were engaged in the business of handling beans, hay, grain and produce.

(Mr. Bennett asked to have the seal broken on a deposition.)

That is my signature on a letter written by me on December 17, 1929, which is attached to Defendant's Exhibit C, the deposition of Austin Jenison. I notice on the top of that letter that it reads "Chatterton & Son, Beans, Grain, Hay and Produce." That stationery was sent us from Michigan. When I went to work for them, I did not know that they were engaged in the grain business outside of Montana. Later on I knew that, according to their stationery.

I wrote to Chatterton and Son's main office asking that they procure a bond. Some time later I also wrote the agents of the Fidelity and Deposit Company of Maryland. The original bond, of [179] which we have been talking, was received by me in January, 1930.

Chatterton and Son, besides engaging in the storage of beans, also bought beans, and when we bought them we paid for them. After these beans were purchased, they were shipped on instructions from

(Testimony of R. J. Healow.)

Kansas City. Sometimes these beans were held in the warehouse. The beans that we purchased outright were kept segregated, and had the names of the men from whom they were purchased on them.

In the spring of 1931, there were some rumors that Chatterton and Son were in a rather bad condition. We had often talked this over with the Secretary of Agriculture during the year, and during the spring of 1931 inquiry was made by the department as to whether or not I thought we came under the laws of the State of Montana. In March or April, 1931, a meeting was held by the various members of the concerns handling beans in reference to the matter of coming under the laws of the State. Prior to that time, I did not know that it was necessary to have a license from the state, but I always figured that we should be bonded. My knowledge as to why the bond should be filed was as a protection to the growers.

(Defendant's Exhibits 19, 20, 21 and 22 were marked for identification.)

That is my signature on Defendant's Exhibit 19. It is also my signature on Defendant's Exhibit No. 20.

Q. Do you remember, Mr. Healow, calling your attention to Defendant's exhibits 21 and 22, whether or not those letters were written in response to those letters?

Mr. WIGGENHORN: If that is the fact, I will admit it, Mr. Bennett.

(Testimony of R. J. Healow.)

A. Yes, they are letters that were written.

Mr. BENNETT: I believe it is correct that we are stipulating as to the copies, that we can introduce those; that there will be no objection as to that? [180]

Mr. WIGGENHORN: That is correct.

Mr. BENNETT: I now offer Defendant's Exhibits 19, 20, 21 and 22 in evidence.

Mr. WIGGENHORN: No objection.

The COURT: You might tell me what the purport of the letters is.

Mr. BENNETT: The purport of those letters is an inquiry from the Department of Grain and Standards of the State of Montana, of the Department of Agriculture, sending a copy of the warehouse act, and asking Mr. Healow, on behalf of Chatterton and Son, whether or not they believed that they came under that act; and Mr. Healow's letters in reference to that, saying that he would take it up with his company and also that he would call a meeting of the bean dealers the coming week to reach some understanding and make definite recommendation. Merely the matter in our case that they were at that time attempting to come under the laws of the State of Montana.

Mr. WIGGENHORN: In view of the statement, I would like to register a formal objection now to the introduction of these exhibits for that purpose announced. If that be the avowed purpose, I think I should object to them as immaterial for that purpose.

(Testimony of R. J. Healow.)

The COURT: Very well; then let them be received then, subject to that objection, if they are offered for that purpose. [181]

EXHIBIT 19

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow
Mont. & Wyo. Mgr. March 26, 1931

Dept. of Agriculture, Labor and Industry,
Helena, Montana.

Attention: Mr. A. H. Stafford,

Gentlemen:

In reply to your letter of March 19th pretaining to the enforcement of the agriculturial seed and warehouse act.

Practically all of the companies handling beans in Billings are branches of larger companies with main offices in different points in the east. The subject under discussion will be taken up with the general offices as I have asked each local manager to take this matter up with their company so we might have something definite to work on at our next meeting.

I was pleased to receive a letter from the president of our company this morning in which he expressed himself as being very much in favor of having the bean business come under the jurisdic-

(Testimony of R. J. Healow.)

tion of the state commissioner of Agriculture. He said your office would have our fullest cooperation in attempting to work out a plausible system of handling beans in the state of Montana. He also stated he would like to see this same thing done in the states of Idaho, Wyoming and Colorado. I believe some action should be taken to have the system standardized in these four states.

I will call another meeting of the bean dealers this coming week to try to reach some definite understanding to recommend to the commissioner of Agriculture. In the meantime we will secure our bond and apply for license, also furnish you with a list of storage tickets showing the amount of advances on the same.

If there is anything further you wish to have brought before this meeting we will be glad to *here* from you.

Yours very truly,

CHATTERTON & SON

RJH:BH (Signed) R. J. HEALOW

(Testimony of R. J. Healow.)

EXHIBIT 20

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow
Mont. & Wyo. Mgr.

April 3, 1931

Department of Agriculture,
Helena, Montana

Dear Mrs. Morris:

This will acknowledge receipt of your letter of March 31st. Accordingly, we will secure a ten thousand dollar bond as requested in your letter. [182]

We are also taking up the matter of the report from the warehouse at Kansas City, which we will forward to you upon receipt of same.

A meeting of the bean dealers of Billings was held last night. You will be getting a report of this meeting from the Secretary of the Dealers Association. I will also write you in a few days on some matters pretaining to what I think should be done. I wish to give this matter some further thought so whatever action we may take, will be to the best interest of all concerned.

Yours very truly,
CHATTERTON & SON, INC.

(Signed) R. J. HEALOW

RJH:BH

(Testimony of R. J. Healow.)

EXHIBIT 21

COPY

March 5, 1931

Chatterton and Son,
North 28th Street,
Billings, Montana.

Gentlemen:

We are inclosing a copy of the Agricultural Seed Warehouse Act, and kindly ask that you read it carefully and notify us as to whether or not it covers your operations. You will note that it provides that all firms receiving agricultural seeds of any kind for storage for the public must give a bond to the State of Montana and make application for license. The term agricultural seed is defined in Section 4 and in Section 7 it provides that the warehousemen must return to the holder of the receipt the identical agricultural seed so placed in said warehouse for storage. There are a number of seed warehouses in Billings operating under this Act.

Very truly yours,

Chief—Division of Grain
Standards & Marketing

TM:C

(Testimony of R. J. Healow.)

EXHIBIT 22

COPY

March 19, 1931

B. J. Healo, Manager,
Chatterton and Son,
Billings, Montana.

After the meeting held with you in Billings Monday pertaining to enforcement of the agricultural seed warehouse act, Mr. Stafford and I have decided to ask those companies coming under the act to furnish the State of Montana with a $10,000 surety bond effective April 1, 1931 and maturing on the first day of July, 1932. The [183] act as you know covers only those companies who store agricultural seeds for the public and it is our interpretation that agricultural seeds include commercial beans. In furnishing bond have your bonding company use the form inclosed and write in the bond that same is to cover the storage of beans or whatever commodity you are handling in agricultural seeds as well as grain. In sending in the bond please inclose $20.00 to pay for license and filing fees and this license will cover you up to July 1, 1932.

It is necessary that we have a list of the storage tickets you have issued and which are in the hands of the farmers and if there are advances against the tickets we would also like this information. We also demand that where storage tickets are out-

(Testimony of R. J. Healow.)

standing that the identical seed be held in storage in Billings to protect same. I trust that before a new crop year we will be able to get together and work out a uniform storage ticket and regulations satisfactory to all dealers.

If you do not come under this Act I would appreciate an expression from you to this effect in order that our files may be cleared.

Thanking you kindly for your cooperation, I am

Very truly yours,

Chief—Division of Grain
Standards and Marketing

Q. Mr. Healow, did you have any insurance on those beans that you had stored in the warehouse?

A. Did we carry insurance?

Q. Yes; that is, Chatterton and Son?

A. Yes, sir.

Q. With what company?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Sustained.

Mr. BENNETT: Exception.

We had made advances on some of the beans in the warehouse. Plaintiff's Exhibit 4, which is a warehouse receipt signed by Chatterton and Son, says, "Deliveries of the beans to holders of receipts shall be as provided by the laws of the State of

(Testimony of R. J. Healow.)

Montana." We delivered some of these beans back to the growers.

Q. Was that your common practice? [184]

Mr. WIGGENHORN: Objected to as immaterial, not in any way tending to prove or disprove any of the issues in this case.

The COURT: Well, I don't see what the point could be.

Mr. BENNETT: If the Court please, there was some testimony this morning that these beans belonged to these particular owners and that they were stored in the warehouse. I want to show that as a matter of fact they were delivered there to be shipped on the market as Chatterton and Son saw fit; and it is very important, if the Court please, because under this Agricultural Seed Act that we are referring to, some of this evidence will show that the department did not figure that any of these warehousemen came under the act of the State of Montana unless they were required to deliver the identical bean back to the owners or receipt holders.

Mr. WIGGENHORN: Counsel is talking about a matter that is for the Court to determine, and as far as the question goes, obviously what conclusion of law this witness might reach would not determine. It would all depend on what orders were given in each instance and the interpretation the Court makes of that warehouse receipt. Furthermore, we are not bound by the interpretation the Commissioner of Agriculture might put upon the

(Testimony of R. J. Healow.)

matter. The Court will decide what was the actual relationship of the parties. [185]

The COURT: What was the question?

(Question read.)

The COURT: Well, I will allow him to answer the question.

Mr. WIGGENHORN: Note an exception.

The COURT: Was that your common practice?

A. If they came and asked for their beans, they got them. They were there. It so states, right in the warehouse receipt.

Plaintiff's Exhibit 4 says, "In event beans are purchased by other than the consignee"—that gives them the privilege of selling them to someone else if they want to—"a handling price of 5c a hundred shall be charged." They could take them out and sell them to someone else, but there was a handling charge. We did not sell the beans for the holders of the warehouse receipts, but I would first buy their beans and then sell them.

Q. And when you made an advance, that was a part of the purchase price, was it not?

Mr. WIGGENHORN: Objected to as a conclusion and not showing the relation in the contract.

The COURT: Well, were these contracts or receipts all the same?

Mr. WIGGENHORN: Yes; he has so testified, Your Honor; universally the receipts were the same.

The COURT: What was that question, again?

(Question and objection read.)

(Testimony of R. J. Healow.)

The COURT: Well, he may say what he advanced; whether it was a part of the purchase price or not. He would know that.

Mr. WIGGENHORN: Exception. [186]

When we made an advance that was not part of the purchase price, it was simply an advance.

Q. What I am trying to get at, Mr. Healow, without being technical, is when you had made an advance on those beans and when you shipped them or sold them, if you did, you arranged with the warehouse receipt holder to pay him for his beans, is that correct?

Mr. WIGGENHORN: Just a minute, if Your Honor please? The testimony, first, is that he did not sell them; that no orders were given to sell them, and we object to the question and all of this line of questioning as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Exception.

I shipped beans out of this warehouse to the Kansas City plant and, when I did, I made the same arrangements with the holders of the warehouse receipts as if they were stored here; they were still their beans if they were not bought.

Q. And when they were received down in the Kansas City warehouse, they were held there for the benefit of the warehouse receipt holders, is that the case?

Mr. WIGGENHORN: Object to that as calling for a conclusion and as incompetent, as the witness has not shown himself qualified to answer.

(Testimony of R. J. Healow.)

The COURT: I think so. Sustain the objection.

Mr. BENNETT: Note an exception.

Q. As a matter of fact, Mr. Healow, Chatterton and Son stored these beans for the warehouse receipt holders until such time as the market was right, and then sold them as agents of the holders of the warehouse receipts, is that correct?

Mr. WIGGENHORN: Objected to as calling for a conclusion and not the best evidence, and contradictory to the evidence. [187]

The COURT: Yes, sustain the objection.

Mr. BENNETT: Note an exception.

The beans were taken out of the warehouse and shipped from some time in the fall of 1930 up to and including July 1931, with my knowledge. They were sent to Kansas City. That is as far as I have any knowledge about the beans. I was relieved of my position as manager in July 1931. The warehouse was being emptied of beans in the middle of July, about the sixteenth or seventeenth. The warehouse was practically empty in three days.

It is correct I represented to some of the bean growers that I had a bond. There was also a federal bonded warehouse in Kansas City. I don't know the requirements necessary to qualify a bonded warehouse. I do know some of the federal requirements. I didn't know there were any requirements for a state bonded warehouse.

Q. You didn't know that an application was necessary?

(Testimony of R. J. Healow.)

Mr. WIGGENHORN: Objected to again, Your Honor, as immaterial.

The COURT: Yes, sustain the objection.

Mr. BENNETT: Note an exception. That is all.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

Plaintiff's exhibit marked for identification "Exhibit D" attached to the deposition of Mr. Jenison, which purports to be a letter, has for a letter head "Chatterton and Son" and under that "Largest Bean Dealers in the World." There is nothing there in regard to any other commodity that might be handled by Chatterton and Son. That is the letter that is signed by me and addressed to Dyer-Jenison-Barry Company, the representatives of the bonding company. This last mentioned letter head was the one I used almost exclusively. It was printed here in Billings. The legend "Largest Bean Dealers in the World" was what they represented themselves to be. [188]

In the warehouse receipt the blank "Gross Wt." would show the total poundage of beans, and the blank "Sack Wt." means that if they were taken in on an uncleaned basis, the weight of the sack, one pound per sack, would be deducted from the total. The blank "% Tare" means the dockage was —if they were in the dirt, it would represent the tare. It states right on there, if they were cleaned beans, we would use the net weight down here below.

(Testimony of R. J. Healow.)

Here in this old warehouse receipt exhibited to me the word "tare" is marked out and "98% Grade" is marked in it. That is to say, we designated the beans as to the grades. The warehouse receipt would, when the grade was established, show what it was. The blank "Received From" would show the owner of the beans, and the number of sacks would be filled in in its appropriate blank. "Storage at" would read "Billings". They were all stored here.

RECROSS-EXAMINATION

By Mr. BENNETT.

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

Mr. WIGGENHORN: I object to that as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Note an exception.

The COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

Mr. BENNETT: Well, I believe, if I might show, that this man will say that those were procured to file with the State of Montana. [189]

(Testimony of R. J. Healow.)

That is my signature on Plaintiff's Exhibit 16, and in the second paragraph it says: "This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office. There have been no questions asked us in regard to this bond, so there is no one who knows but what this bond has been on file in your office ever since it was signed." That is my signature signed to that.

Mr. BENNETT: That is all, Mr. Healow.

Mr. WIGGENHORN: That is all. Now, may the record show that by agreement of counsel certain correspondence in the office of the Commissioner of Agriculture of the State of Montana pertaining to this case may be offered by either of the parties without objection as to its competency? That applies particularly to copies of letters written by the Department of Agriculture, of which, of course, we don't have the originals and they would not therefore be competent evidence. And likewise, that they do not have to be identified? Do we understand each other?

Mr. BENNETT: I would like to correct or limit the competency in this regard; we are not objecting to it as not the best evidence. In other words, we are admitting the copies.

The COURT: Not as to the competency, but as to the [190] materiality, you will discuss that later?

Mr. WIGGENHORN: Yes, Your Honor. And likewise, that they don't have to be otherwise identified.

(Testimony of R. J. Healow.)

Mr. BENNETT: Yes.

Mr. WIGGENHORN: I will offer separately, then, Plaintiff's Exhibits 6-7-8-9-10-11-12-13-14-15-16 and 17, all being portions of the correspondence referred to.

Mr. BENNETT: No objection to Plaintiff's Exhibit 6.

EXHIBIT 6.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY
INSURANCE

The Insurance Bldg.
123 South Grand Ave.,
Lansing, Michigan.

Apr. 29th, 1931

Division of Grain Standards,
Department of Agriculture,
Labor and Industry,
Butte, Montana.

Re: Chatterton & Son—
Bond No. 3591931

Gentlemen:

Here is a letter from the Bonding Company authorizing coverage under this bond to apply to Chatterton & Son, Inc., of Kansas City as of December 6th, 1930, which was the date of their incorpo-

(Testimony of R. J. Healow.)

ration. We would appreciate it if you would let us know if this is satisfactory evidence.

Very truly yours,

THE DYER-JENISON-BARRY CO.
(signed) AUSTIN JENISON
Austin Jenison, Mgr.
Casualty & Surety Dept.

AJ/MS

No objection to Plaintiff's Exhibit 7.

EXHIBIT 7.

COPY

May 6, 1931

Austin Jenison, Manager,
Casualty & Surety Department,
Lansing, Michigan.

Dear Sir:

We are in receipt of your letter dated April 29 regarding a bond which Chatterton and Son gave to the State of Montana in the amount of $10,000. This bond has not been filed with this department, and [191] we would appreciate it if you would look into the matter and have bond filed with us.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

No objection to Plaintiff's Exhibit 8, except Defendant objects to the second sheet of Plaintiff's Exhibit 8 on the grounds and for the reason that it is incompetent, irrelevant and immaterial, in that it purports to state facts from memory, which is not the best evidence, and that it is written at a time not coincident with the matters happening as stated in the letter.

The COURT: If it is from memory concerning some written document——

Mr. BENNETT: It is an attempt to state from memory dates and what happened, which I believe we are already offering in evidence here.

The COURT: Well, it may be received subject to your objection. If you have the correct dates and those are only from memory, I suppose the correct dates will prevail.

Mr. WIGGENHORN: May I just suggest, so there will be no inconsistency, I noticed your objection said "incompetent" as well as "irrelevant and immaterial."

Mr. BENNETT: I am not objecting to this on the ground it is not properly identified.

(Testimony of R. J. Healow.)

EXHIBIT 8.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

May 12, 1931.

R. J. Healow,
Mont. & Wyo. Mgr.,
Department of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

You will find inclosed public warehouseman's bond #3591931. This [192] bond was executed on the 7th day of January 1930, and the same has been in our files ever since. This was an oversight on our part, which we are very sorry occured.

We have attached to this bond a letter dated May 4th, 1931, which will give you some information which you will want. You will note by the copy of this letter that Chatterton & Son, Incorporated of Kansas City, Missouri, dates back to December 6th, 1930. At that time Mr. Chatterton advised the bonding Company to change the name and also to have this bond extended to expire on July 1, 1931.

You will also note where they mailed the Continuation Certificate to the Department of Agriculture at Butte, Montana. It would seem to me that the Postmaster at Butte would forward this

(Testimony of R. J. Healow.)

letter to your office, or return the same to the bonding office.

We will keep after this until we get the right documents located at the right places.

This copy of a letter we are inclosing will show you that it was our intention to be bonded with the Department and to keep the bond in force under the new corporation, also that this bond is in force at this time. [193]

We will endeavor to locate the Continuation Certificate and have the same forwarded to you.

Yours very truly,

CHATTERTON & SON, INC.

RJH:BH (signed) R. J. HEALOW

COPY

May 4th, 1931

Mr. R. J. Healow,
Chatterton & Son, Inc.
Billings, Montana

My dear Mr. Healow:

I will try to straighten out the situation in connection with the Warehouseman's Bond. This matter was originally brought to our attention some time during October 1929. Mr. Madsen asked me to get in touch with you, and on November 12th, 1929 we wrote to you saying that before we could go ahead with the issuance of this bond it was necessary to have sent on to us certain forms, statutory

(Testimony of R. J. Healow.)

in nature, required by the State of Montana. The reason for this was that each different state in the union words their various forms of bonds differently. We also wrote on December 6th, repeating our previous request, because we had not heard from you in the meantime. Apparently you then suggested that we write direct to the Secretary of Agriculture in Helena for these forms, which we did on December 16th. A few days later the forms were sent to us. The bond was executed and dated as of January 7th, 1930, and was mailed out of our office to you on January 15th, 1930—copy of letter in our file, saying that you should file this bond with the Secretary of the State of Montana, and going on to say that the bond had been properly executed both by the Lansing Office of Chatterton & Son and the Bonding Company, with seals attached.

This original bond ran from January 1st, 1930 to July 1st, 1930, or to make its expiration date coincide with the period required by the Department of Agriculture of Montana. This bond was signed by the Fidelity and Deposit Company of Baltimore, and the number is 3591931—the amount is $10,000.00—and the annual premium is $100.00. On or about the first of July to meet the requirements of the fiscal year of Montana a so-called Continuation Certificate was issued by the Bonding Company, and forwarded by our office to the Secretary of Agriculture at Billings, continuing the

(Testimony of R. J. Healow.)

bond in force for a year from July 1st, 1930 to July 1st, 1931.

About a month or so ago the Receiver and Attorney for the Lansing concern asked to have the bond cancelled as far as they were concerned. At the same time Mr. Chatterton said that he wished the bond in force for the Kansas City Corporation, so we had a letter written by the Bonding Company, dated December 6th, 1930, which was the date of the corporation at Kansas City, and addressed to the Division of Grain Standards and Marketing, Department of Agriculture, Labor and Industry, Butte, Montana, authorizing change of name of the principal of the bond. We do not know why this letter was addressed to Butte, Montana unless it was on information which the Bonding Company had from some Department of the State of Montana. This letter was forwarded on April 29th, and a copy of it was sent to the Kansas City Office on that same day. [194]

There is no question but what this bond has been in force since January 7th, 1930, and it must have been properly filed somewhere in the State of Montana or you could not have had your license to operate this warehouse. We are sending an extra carbon of this letter to you in case you wish to pass it on to anyone in authority in the state, and also a copy to your Kansas City Office, and we hope

(Testimony of R. J. Healow.)

that this explanation will straighten everything out.

Very truly yours,

THE DYER-JENISON-
BARRY CO.
Austin Jenison, Mgr.
Casualty & Surety Dept.

AJ/MS

Mr. BENNETT: No objection to Exhibit 9.

EXHIBIT 9.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY
INSURANCE
The Insurance Bldg., 123 South Grand Ave.
LANSING, MICHIGAN

May 12th, 1931

Department of Agriculture,
Labor and Industry,
Helena, Montana.

Attention: Mr. Morris—Division of Grain Standards and Marketing.

Dear Sir:

Your letter of May 6th in connection with the bond of Chatterton & Son, Inc. for operating a warehouse at Billings is before me, and I do not understand what has happened. This bond was written January 7th, 1930 by the Fidelity and

(Testimony of R. J. Healow.)

Deposit Company of Maryland and mailed out of our office on January 15th, 1930 to Mr. R. J. Healow, representative of Chatterton & Son at Billings, Montana, with instructions to file same with the Secretary of State. It was renewed on July 1st, 1930 to make its expiration date coincide with the period required by your Department, and continuation certificate was forwarded by our office to the Secretary of Agriculture at Helena. It is our understanding that Chatterton & Son had to be licensed in order to operate this warehouse, which they have been doing since the first part of 1930, so someone must have received the bond in order to have issued them the license.

In any event, the bond has gone astray, and we are asking our Company to issue a duplicate, which we will forward to you as soon as possible.

Very truly yours,

THE DYER-JENISON-
BARRY CO.
(signed) AUSTIN JENISON
Austin Jenison, Mgr.
Casualty & Surety Dept.

AJ/MS

[195]

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Exhibit 10.

EXHIBIT 10.

COPY

May 14, 1931

R. J. Healo, Manager,
Chatterton and Son, Inc.,
Billings, Montana.

Dear Mr. Healo:

I have your letter of May 12 in which you have inclosed a warehouse bond in the amount of $10,000 covering your operations from January 1, 1930 to July 1, 1930. I certainly regret that this bond was overlooked and not filed with us at the time of its execution, as it would have avoided a great deal of misunderstanding in that territory regarding your operations. I would recommend that you locate the continuation certificate of this bond covering the period July 1, 1930 to July 1, 1931 and file it with us. Then in filing bond from July 1, 1931 to July 1, 1932 have a new bond executed and send us a license fee of $15.00 to cover you the coming year.

This will straighten out the entire matter, making you a legally bonded warehouseman for the past 2 years, and if inquiries are again received here, we can satisfy the parties interested.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Exhibit 11.

EXHIBIT 11.

COPY

May 15, 1931

Austin Jenison, Manager,
Casualty and Surety Department,
The Dyer-Jenison-Barry Company,
Lansing Insurance Agency,
Lansing, Michigan.

Dear Mr. Jenison:

Replying to your letter of May 12 regarding bond which you issued covering Chatterton and Son, Inc., their agent at Billings, Mr. Healo, found the original bond in his files and forwarded it to this office. However, the renewal certificate covering the period July 1, 1930 to July 1, 1931 has not been received by this office, and we kindly ask that you make out a duplicate of this certificate and send it to us. At no time did we issue a license to Chatterton and Son, as their bonds were mislaid and not filed with us.

The season for new bonds is on at this time and we are asking the company to furnish us a bond for the year July 1, 1931 to July 1, 1932, and we are asking that same be executed on form inclosed.

(Testimony of R. J. Healow.)

You may be taking care of this matter, and we are therefore sending this form to you.

Very truly yours,
Chief—Division of Grain
Standards and Marketing

TM:C

[196]

Mr. BENNETT: I object to Plaintiff's offered Exhibit 12 on the grounds that it is irrelevant and immaterial, and that page two of the exhibit purports to be a copy of an instrument, the original of which is before the Court at the present time, and is not a true and correct copy.

The COURT: What does it refer to?

Mr. BENNETT: This is a letter that purports to send to the Department of Agriculture a copy of the renewal certificate, and as I understand, you are offering the renewal certificate?

Mr. WIGGENHORN: Yes, of course; but the exhibit would not be complete without it. That is what identifies it. That is true, but the exhibit would not be complete without it.

The COURT: Very well, it will be received subject to your objection.

Mr. BENNETT: Note an exception. [197]

(Testimony of R. J. Healow.)

EXHIBIT 12.

THE DYER-JENISON-BARRY CO.
LANSING INSURANCE AGENCY

INSURANCE

The Insurance Bldg. 123 S. Grand Ave.
Lansing, Michigan

May 18th, 1931

Department of Agriculture,
Labor and Industry,
Helena, Montana

Attention: Mr. Morris—Chief—Division Of Grain Standards and Marketing.

Dear Sir:

Your letter of the 15th in connection with Chatterton & Son, Inc. explains everything in relation to the Warehouseman's Bond. We are enclosing copy of Fidelity and Deposit Company's Renewal Certificate, showing that this bond was renewed for a period of one year commencing July 1st, 1930. We have forwarded the new form which you sent on to us, to the Bonding Company for execution, and will have it filed well before July 1st of this year.

Very truly yours,
THE DYER-JENISON-
BARRY CO.
(signed) AUSTIN JENISON
Austin Jenison, Mgr.
Casualty & Surety Dept.

AJ/MS

(Testimony of R. J. Healow.)

(Enclosure)

FIDELITY & DEPOSIT COMPANY

Premium $100.00
BOND #5809

Assured—Chatterton & Son, Lansing, Michigan as Principal and the FIDELITY & DEPOSIT COMPANY OF MARYLAND, as Surety, in a certain Bond No. 3591931, dated the 7th day of January, 1930 in the Penalty of Ten Thousand Dollars ($10,000.00) in favor of STATE OF MONTANA, do hereby continue said bond in force for the further term of one year beginning on the 1st day of July, 1930.

Provided, however, that said bond as continued hereby, shall be subject to all its terms and conditions, except as herein modified, and that the liability of the said FIDELITY & DEPOSIT COMPANY of Maryland under said bond and any and all continuations thereof shall in no event exceed in the aggregate the above named penalty, and that this certificate shall not be valid unless signed by said Principal.

Signed, sealed and dated this Tenth day of July, 1930. [198]

Mr. BENNETT: And we object to Plaintiff's Exhibit No. 13, on the grounds that it is irrelevant and immaterial, and that it refers to Plaintiff's Exhibit 12; and that it refers to an instrument,

(Testimony of R. J. Healow.)

the original of which is already offered in evidence, and is repetition.

The COURT: That will be received in the same manner, and the same ruling on it.

Mr. BENNETT: Note an exception.

EXHIBIT 13.

COPY

May 22, 1931.

Austin Jenison, Manager,
Casualty and Surety Department,
The Dyer-Jenison-Barry Company,
Lansing Insurance Agency,
Lansing, Michigan.

Dear Mr. Jenison:

This will acknowledge receipt of your letter of May 18 in which you have inclosed continuation certificate of warehouseman bond furnished the State of Montana and covering Chatterton and Son. We thank you very much for sending this to us. We note that you have forwarded the new form which we sent you to the bonding company for execution and it will be filed with this department before July 1 of this year.

We are pleased to have this information.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Plaintiff's Exhibit 14.

EXHIBIT 14.

COPY

May 22, 1931.

R. J. Healo, Manager,
Chatterton and Son, Inc.,
Billings, Montana.

Dear Mr. Healo:

In this afternoon's mail I received a letter from the bonding department of the Fidelity and Casualty Company, Lansing, Michigan, in which they inclosed a continuation certificate of bond covering your operations for the period July 1, 1930 to July 1, 1931, and they have also notified us that new bond for the coming year will be executed [199] by the company and filed with us before July 1.

I am sure that this information is as pleasing to you as it is to me.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

Mr. BENNETT: We object to *Defendant's* Exhibit 15, as it is irrelevant and immaterial and re-

(Testimony of R. J. Healow.)

fers to the copy of an instrument already offered in evidence; and that it is repetition.

The COURT: The same ruling.

Mr. BENNETT: Note an exception.

EXHIBIT 15.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow,
Mont. & Wyo. Mgr.

May 29, 1931

Dept. of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

Pleased to receive your letter of May 22nd, informing us that the continuation certificate had reached your office.

While this is somewhat late, nevertheless you now understand that our intentions were good and we will endeavor to be more prompt in handling these matters in the future.

Yours very truly,

CHATTERTON & SON, INC.,
(signed) R. J. HEALOW

RJH:BH

Mr. BENNETT: No objection to Plaintiff's Exhibit 16.

(Testimony of R. J. Healow.)

EXHIBIT 16.

Billings, Montana
July 21, 1931

Department of Agriculture,
Helena, Montana.

Dear Mrs. Morris:

In looking over some of the effects of Chatterton & Son, I ran across bond No. 5809 which appears to be a continuation certificate of the [200] 1930 bond. This is signed by the president of the company, also acknowledged and I am sure the same is in effect at that time for any business done by Chatterton & Son previous to July 1, 1931.

This should have been mailed to you a long time ago, but it was overlooked when it was received at the Billings office. There have been no questions asked us in regard to this bond, so there is no one who knows but what this bond has been on file in your office ever since it was signed.

The Department can depend on me to do anything in my power to help the growers so they will not stand a loss.

Yours very truly,

(Signed) R. J. HEALOW
Robert J. Healow.

RJH:BH

P. S. In writing me address to: 114 Ave. D.

(Testimony of R. J. Healow.)

Mr. BENNETT: No objection to Plaintiff's Exhibit 17.

EXHIBIT 17.

COPY

July 23, 1931

Mr. Robert J. Healow,
114 Avenue "D",
Billings, Montana.

Dear Mr. Healow:

I have your letter of July 21 and certificate #5809 continuing your bond in force for last season. I am glad that the original certificate has been located. I have on file a copy of this certificate sent to the department by the bonding company agency in Lansing, Michigan. I certainly appreciate the fact that you sent this certificate here and your cooperation.

The storage tickets are coming in, but we have no word from Chatterton and Son of Kansas City as yet to matter of settlement. The company being solvent I see no reason of the necessity of calling the bonds and will not move here until we have something definite from the Kansas City office.

Very truly yours,

Chief—Division of Grain
Standards and Marketing

TM:C

(Testimony of R. J. Healow.)

Mr. WIGGENHORN: We now offer in evidence Plaintiff's Exhibit One, which again is covered by understanding and stipulation that it need not be identified, as I understand it, Mr. Bennett? (Handing Exhibit 1 to Mr. Bennett).

Mr. BENNETT: It is the understanding that it need not [201] be further identified.

Mr. WIGGENHORN: Now, we understand, do we not Mr. Bennett, that that is the same instrument referred to in Plaintiff's Exhibit number 6, as being inclosed therein?

Mr. BENNETT: That is the same.

Mr. WIGGENHORN: Then, in connection with this offer, Your Honor, it is understood that Exhibit One, which is an instrument executed by the bonding company, consenting to changing the name from Chatterton and Son to Chatterton and Son, Inc., was transmitted in the letter from the agent of the bonding company, which is marked "Plaintiff's Exhibit 6."

The COURT: Yes. What is the objection to it?

Mr. BENNETT: The general objection that it is incompetent, irrelevant and immaterial, in that it is not shown that the original bond or the renewal certificate has been filed with the Department of Agriculture or approved, or that a license to do business in the State of Montana has been issued to Chatterton and Son.

The COURT: Very well, it may be received in the same manner, and you may have the exception.

(Testimony of R. J. Healow.)

Mr. BENNETT: Yes, exception.

EXHIBIT 1.

FIDELITY AND DEPOSIT COMPANY
of Maryland
Fidelity and Surety Bonds
Burglary and Plate Glass Insurance
Dime Bank Building
DETROIT

J. L. Straughn
Resident Vice President

Telephone
Cadillac 4323-4-5

December 6th, 1930

Division of Grain Standards and Marketing,
Department of Agriculture,
Labor and Industry,
Butte, Montana. [202]

Re: #3591931—Chatterton & Son—Lansing, Michigan

Gentlemen:

This company is now surety on a Public Warehouseman's bond for the above in the penalty of $10,000.00 in favor of the State of Montana.

It is our understanding that Chatterton & Son have incorporated their Kansas City office under the name of "Chatterton & Son, Inc.". You may consider this letter as our consent as surety, to this

(Testimony of R. J. Healow.)

change and the coverage under this bond will not in any way be *effected* by it.

Very truly yours,

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
BY: (Signed JOSEPH A. BACH
JAB:H Attorney in fact (Seal)
(CORPORATE SEAL)

(It was agreed between counsel that Plaintiff's Exhibits 1, 2 and 3 remained in the hands of the Department of Agriculture of the State of Montana from the time they received them, as shown by the testimony, until they were offered here.) [203]

Plaintiff's "Exhibit 5" received in evidence without objection.

EXHIBIT 5.

STATE OF MICHIGAN
THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM
IN CHANCERY

In the Matter of the Petition of H. E. Chatterton, et al, for the dissolution of Chatterton & Son, a Michigan Corporation.

The petition of H. E. Chatterton, B. A. Stickle, L. E. Marshall, H. H. Calkins, A. E. Schepers,

(Testimony of R. J. Healow.)

T. J. Hubbard and M. B. Keeler, representing the entire Board of Directors of Chatterton & Son, a Michigan corporation having its office and principal place for the transaction of business in the city of Lansing, in said county, for the dissolution of said corporation, Chatterton & Son, having come on to be heard on an order to show cause issued in the premises under the statute in such case made and provided, and from proofs taken in open Court it appearing to the Court that said Corporation, while not insolvent, has been forced to suspend operation by reason of the fact that so much of its assets are invested in property of a fixed and permanent nature as to make it impossible to properly finance operations; and it further appearing that by reason of such fixed investments and the demands of creditors to whom large sums of money are owing and from whom legal proceedings have been threatened would prevent the orderly liquidation of such assets by the company itself without the aid of this Court; and it appearing to the Court that a dissolution of said Corporation will be beneficial to the stockholders and creditors of the corporation and not injurious to public interests,

NOW, THEREFORE, it is ordered, adjudged and decreed, and this Court, by virtue of the power therein vested by statute does order, adjudge and decree, that Chatterton & Son, a Michigan corporation be and the same is hereby dissolved.

It is further ordered and adjudged that Joseph Gerson, of Lansing, Michigan, be and he is hereby

(Testimony of R. J. Healow.)

appointed permanent receiver of the property, estate and effects of said Corporation for the purpose of liquidating such assets and distributing the proceeds to those entitled thereto under further orders and further instructions of this Court.

It is further ordered that the receiver on or before the 25th day of April, 1931, file with the clerk of said Court a bond subject to approval of this Court in the penal sum of Fifty Thousand Dollars, condition for the faithful performance of the duties of the receiver in proper execution of his trust under such orders as the Court from time to time shall give.

Leland W. Carr
Circuit Judge.

Dated: Lansing, Michigan April 22nd, 1931.

[204]

STATE OF MICHIGAN : ss.
County of Ingham :

I, C. ROSS HILLIARD, Clerk of the Circuit Court for the County of Ingham, do hereby certify that the above and foregoing is a true and correct copy of Order of Dissolution entered April 22, 1931, in the above entitled cause in said Court, as appears of record in my office, and that I have compared the same with the original, and that it is a true transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at

(Testimony of R. J. Healow.)

Lansing, Michigan, this 16th day of May, A. D. 1935.

C. ROSS HILLIARD,
County Clerk

(SEAL) By (signed) IRENE M. FERRIS
Deputy County Clerk

Witness excused.

G. B. DEAVITT,

a witness called for the plaintiff, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is G. B. Deavitt. I am sixty-six. I live in the vicinity of Billings. I was one of the bean growers who deposited some of my beans for storage with Chatterton and Son in the season of 1930. The manager of the warehouse, at the time I placed my beans in storage, told me it was a bonded warehouse.

Q. And did that in any way enter into your determination and conclusion to put the beans in that warehouse?

Mr. BENNETT: Just a moment? That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

(Testimony of G. B. Deavitt.)

Mr. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given. [205]

The COURT: I think so. Overrule the objection.

Mr. BENNETT: Note an exception.

A. It did.

His statement that the warehouse was bonded influenced my decision in putting the beans in that warehouse, as I thought they would be safe. This information also influenced me in keeping the beans there. I never saw the bond myself.

No cross-examination. Witness excused.

WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(Mr. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.

The COURT: That may be understood; and it is overruled, and it is excepted to.)

Witness excused.

H. A. APPLEBY,

a witness called for the plaintiff, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

Mr. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course? [206]

Mr. BENNETT: Yes.

The COURT: All right.

I was one of the committee of three selected by the owners of beans in this warehouse. They chose the three of us to represent them as a whole.

This was occasioned by my getting a call that they were shipping the beans out some time in July 1931, so a bunch of the bean growers got together and we had a meeting at the Commercial Club in Billings. It was quite a large meeting. The other men there were in a similar situation. They had all learned of the same thing. There were about thirty-five growers present. Mr. Moran, a deputy of the Department of Agriculture, was here. He had something to do with getting us together, and a committee was selected at that time. Mr. Harris and Mr. Kober were the other two members

(Testimony of H. A. Appleby.)

of the committee. We were selected by this group of men.

(It was stipulated by counsel for both parties that this committee was selected to act for the whole.)

No cross-examination. Witness excused.

LEWIN KOBER,

a witness called for the plaintiff, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is Lewin Kober, third member of this committee.

(It is agreed between counsel for both parties that Mr. Kober will repeat Mr. Deavitt's testimony, subject to the same objection. The Court made the same ruling.)

I have been growing beans prior to the time I was a member of this committee, and had had quite a lot of experience in growing [207] and handling beans. I recall when the warehouse was closed. I used to stop at the warehouse about once a week to see if my beans were still there. My lot of beans was there, but about July 16 or 17 when I went to the warehouse they were gone. They were loading at that time. The meeting that Mr.

(Testimony of Lewin Kober.)

Appleby has testified to was held a few days afterwards. I attended the meeting.

A grower ordinarily selects a big, firm bean for seed. If my beans in sacks in the warehouse were a number one bean, they would be fit for seed. I would not have to go over that sack and pick out certain ones for seed. I should think that any marketable number one bean would be proper for seed, and it is so understood among the growers who understand the business. We usually pick a number one bean for seed.

CROSS-EXAMINATION

By Mr. BENNETT.

I received back some of the beans that were stored. This spring I bought my bean seeds at the beanery. I think a number one bean is good enough for a seed bean. Number two and number three are not.

Witness excused.

Plaintiffs then presented and offered the deposition of H. E. Chatterton as a witness, duly sworn, taken pursuant to stipulation, objections being registered at time of taking deposition and ruled on at the trial. [208]

DIRECT EXAMINATION

By Mr. WIGGENHORN.

H. E. CHATTERTON,

a witness called for the plaintiff, whose testimony was procured by a deposition pursuant to stipulation, being first duly sworn, testified as follows:

My name is Howard E. Chatterton of Basin, Wyoming. I was born March 16, 1872. I am in the bean business. I usually go by the name of H. E. Chatterton.

I was president of Chatterton and Son, a corporation of Lansing, Michigan. My father and myself organized the company. We had been in business approximately twenty-five years before the year 1931, originally at Mount Pleasant, Michigan and later at Lansing, Michigan. In 1930 and immediately thereafter the main office of the company was at Lansing. I was then its president, and my father was deceased. Our business was operating a chain of elevators through the State of Michigan, and terminal warehouses. The principal business was the bean business. By that I mean the buying and selling and storage of beans. We had approximately thirty warehouses through the State of Michigan, and a terminal warehouse at Toledo, Ohio, one at Kansas City, Missouri, and one at Billings, Montana. The one at Billings was not a terminal warehouse. By a terminal warehouse we mean one where we buy beans and ship them in there for processing. At Billings the beans were

(Testimony of H. E. Chatterton.)

practically all from the growers, with the exception of a few that were bought down in Wyoming. Seventy-five per cent of our business all over was the bean business in 1930.

In 1930 I was the president and chairman of the Board of Directors of the company. At that time we started to put beans up [209] in cartons and I spent most of my time looking after the carton business. I was the active head of the company.

In 1919 I signed over $100,000 worth of stock to three young men, to be paid for out of the profits. I was still the president and chairman of the board and drawing a salary, but I was not active with the business, only that I made it a point to go to Lansing about every ten days, or two weeks and attend the directors' meetings, and was in close touch with the office by phone. But by 1925 or 1926 I was again in active charge of the business and spent all my time with Chatterton and Son. Until the close of the company I was the active head.

The Kansas City terminal was engaged exclusively in the bean business. It was in no way engaged in the grain business.

The warehouse at Billings was established along in August 1928 or 1929. It was closed in 1931 and troubles ensued. That was some time in June or July. The 1930 crop was then in storage. We had also handled the 1929 crop and I am under the impression that we handled the 1928 crop in Billings.

(Testimony of H. E. Chatterton.)

The warehouse at Billings was engaged exclusively in the bean business. We were buying beans from the farmers, cleaning them, storing them and shipping them out on orders sent from either the Kansas City or Lansing office. We were also engaged in warehousing beans. A large percentage of the business at Billings was conducted through the Kansas City office. I think, however, that they received most of their instructions from the Lansing office.

We also had a warehouse at Twin Falls, Idaho, none in Colorado but buyers at Greybull, Wyoming and Powell, Wyoming. All this western business consisted exclusively of beans. Ninety-five per cent of them were Great Northerns, which are particularly a western product. [210]

Chatterton and Son frequently did business with surety companies. The Dyer-Jenison-Barry Company handled practically all of our bond business. Austin Jenison was the individual in that agency who handled this. Ninety-five per cent of our bond business was done through them. My relationship with Mr. Jenison was an intimate one. We received railroad bonds mostly from this agency. These are bonds furnished the railroad companies for the delivery of cars without the original bill of lading. When we first started to do business with them, we filed our financial statement with them, and from time to time, when it was necessary to solicit bonds, they wrote the bond on the face of the statement that we had filed with them, so that we did

(Testimony of H. E. Chatterton.)

not have to go through the usual form every time we applied for a bond.

Mr. Jenison became quite familiar with the character of our business. Mr. Jenison and I were also members of the Elks lodge together. We were members of the same country club, and Mr. Madsen and Mr. Stickle and Mr. Reynolds, our attorney, were members of the same bridge club. Mr. Madsen was secretary and treasurer of Chatterton and Son. Mr. Stickle was a director, and vice president and manager of the bean department. Mr. Reynolds was our attorney. We had another individual who was the manager of the grain department.

Mr. Jenison knew that Mr. Stickle was manager of the bean department. We were all members of a certain bridge club, composed of twelve gentlemen, and we met more or less frequently, and on those occasions we talked to each other about my business affairs, more or less. Mr. Jenison, during these various contacts I have mentioned, became acquainted with the general character of the business of Chatterton & Son, because when we first made application for our bonds, why he was informed then as to what the character of our business was. We had been doing business with them for several years. They also carried the insurance on our automobiles around the various plants.

As to what knowledge Mr. Jenison gained of the predominance of our bean business, we were at that time doing business with the three [211] large

(Testimony of H. E. Chatterton.)

advertised bean canners, and we were proud of it, and Mr. Jenison being a personal friend of all four of us, we used to tell him about some of the volume of bean business that we had put through. As business men, we were prone occasionally to boast of our business.

He gained knowledge that our western business including Billings was exclusively the bean business because we did not talk about handling anything else excepting beans. Particularly he knew that our western business was exclusively the bean business and he knew Mr. Stickle was manager of the bean department.

The railroad bonds referred to were written partly on our western business. I am under the impression that the bonds specified the commodity in which the shipments were to be made. That commodity would be beans.

On the bond which is the subject of this suit dated January 7, 1930, given by Fidelity and Deposit Company of Maryland as surety and Chatterton and Son as principal, was signed by V. A. Stickle as vice president, the same man I have heretofore referred to. I did not sign the bond for the company. Mr. Stickle signed the bond. I think because he was manager of the bean department and it would be natural for it to be referred to him.

The renewal certificate is signed by Fidelity and Deposit Company of Maryland, dated July 10, 1930, and was signed by myself. I do not remember doing

(Testimony of H. E. Chatterton.)

so, but it shows that I did. I might have done so because of Mr. Stickle's absence.

The paper marked for identification "Exhibit A", a photostatic copy of the application for this bond referred to, appears to have been signed by myself, although I do not remember it. I do recollect the occasion when this bond was sought and received because of correspondence that I had with Mr. Healow, manager of the Billings plant at the time the request for the bond was made by the Commissioner of Agriculture. I remember that the bond was requested and supplied, [212] but I do not remember this precise application. I do not recall signing the renewal certificate or of not signing the original bond, but I do remember the request by the Commissioner of Agriculture to furnish a bond, and the correspondence that I had with Mr. Healow.

(Exhibit A offered in evidence without objection.)

EXHIBIT A.

[PRINTER'S NOTE: Exhibit A—Photostatic copy of application for bond here set forth in the typewritten record is already set forth in the printed record at pages 95-98, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [213]

(For the purposes of the record, Mr. Bennett admits that the Dyer-Jenison-Barry Company of Lansing, Michigan, were the agents for the Fidelity and Deposit Company of Maryland, the defendants herein.)

(Testimony of H. E. Chatterton.)

The Kansas City branch was later incorporated as a separate corporation under the name of Chatterton and Son, Inc., some time in 1931. It might have been December 6, 1930. The incorporating of the Kansas City branch was an idea of my own, after I had made up my mind that there was no possible show of saving Chatterton and Son, and I thought that by getting permission from my creditors, if I would incorporate it I might keep it as a going concern. It did not change the status of the business of Chatterton and Son any time up to the time that the Joe Gerson Company was incorporated, which took over the assets of Chatterton and Son, Inc., and Chatterton and Son, Inc., then bought the assets from the Joe Gerson Company. The facts are, in order to get them straight, that the branch was first incorporated as Chatterton and Son, Inc., and was occasioned by reason [216] of certain pressing financial obligations of Chatterton and Son in Lansing, Michigan; that the stock of Chatterton and Son, Inc., was wholly owned by either Chatterton and Son or the receiver of that company, who was Joseph Gerson of Lansing, Michigan; that Chatterton and Son went into the hands of a receiver April 1931; that subsequently the name of Chatterton and Son, Inc., was changed to Joseph Gerson and Company, and thereafter a new company was organized known as Chatterton and Son, Inc., having no connection of any sort with either Chatterton and Son or the original Chatterton and Son, Inc.

(Testimony of H. E. Chatterton.)

When Chatterton and Son, Inc., was incorporated, it just took over the assets that it had there in Kansas City, but the assets of Chatterton and Son, Inc., belonged to the receiver of Chatterton and Son. Therefore, the assets here at Billings belonged to the receiver of Chatterton and Son. After the receiver was appointed, Chatterton and Son was no longer in active business and has not been since, although the affairs of the receiver are not yet finished.

In order to clear the record, because of having two different corporations known as Chatterton and Son, Inc., we will call them respectively Chatterton and Son, Inc., the first and Chatterton and Son, Inc., the second.

Chatterton and Son, Inc., the first changed its name to Joseph Gerson Company, which company took over all of its assets and finally it was dissolved in 1933. It was a Missouri corporation. Our warehouse was closed here in Billings about June of 1931, and there were not sufficient beans in the warehouse here to satisfy the outstanding warehouse receipts. Settlement was made through representatives of the bean growers at Kansas City by Chatterton and Son, Inc., the first, and that company, to the best of my knowledge, turned over all of its remaining assets at that time to the representatives of the bean growers and to Mr. Stafford, the Commissioner of Agriculture of the State of Montana. [217]

(Testimony of H. E. Chatterton.)

These assets consisted mostly of promissory notes and beans and cash put up with the bonding company for a bond. I know there was $2500.00 deposited with a bonding company, not the Fidelity and Deposit Company of Maryland. There was around $8000 or $9000 worth of beans released and the promissory notes totaled about the same amount. I don't know whether these bonds were paid or cashed in. After turning over these assets, there was no property left in Chatterton and Son, Inc., the first. That company has done no business since then.

CROSS-EXAMINATION

By Mr. BENNETT.

I am now living at Basin, Wyoming. I am in the bean business, doing business under the name of Chatterton and Company, and that is a separate corporation from any of those that we have been talking about. It is not a corporation; it is a partnership.

I was the president and chairman of the board of Chatterton and Son, the original company, and except for a period between 1919 and 1925, I was the active head. During that period I was also the president and chairman of the board, but during the period of 1919 to 1925, I turned over the actual handling of the business to three men. They were no relation of mine whatever.

I cannot tell you the approximate date when Chatterton and Son became financially involved. I

(Testimony of H. E. Chatterton.)

testified that Chatterton and Son was in bad shape and decided to cut off the Kansas City branch and incorporate it. That was approximately December 6, 1930. Chatterton and Son, Inc., was merely the incorporation of the Kansas City branch of the original Chatterton and Son. Thereafter, Chatterton and Son, Inc., turned over their assets to the Joseph Gerson Company. That was along in 1931. I was the president of Chatterton and Son, Inc., the first. I don't think we had a chairman of the board. [218] I continued as president as long as this company carried on business. I held no position whatever with the Joseph Gerson Company. The officers of the Joseph Gerson Company were composed of Mr. Reynolds, Mr. Gerson and Mr. Calkins, the auditor of the old company of Chatterton and Son. This is the same Mr. Reynolds that I referred to as our attorney in Lansing. He was also the attorney for the receiver.

The stock of Chatterton and Son, Inc., the first which was taken over by the receiver of Chatterton and Son, was not sold by the receiver. The Joseph Gerson Company, referred to herein, was Chatterton and Son, Inc., number one, and merely was a change of name. That was some time in 1931. At the time Chatterton and Son, Inc., changed its name, there were still some assets left. No receiver was appointed for the Joseph Gerson Company. The beans, cash and notes that were held by this company were turned over to the representatives of the growers from Montana.

(Testimony of H. E. Chatterton.)

Thereafter, we formed an entirely new corporation called Chatterton and Son, Inc., which we have referred to as number two. That was just a little while before the representatives of the growers in Montana came down there. This second corporation acquired none of the assets of either Chatterton and Son or Chatterton and Son, Inc., the first. It was a new company with new financing. I was the president of Chatterton and Son, Inc., the second which was later taken over by Sinshimer and Company of San Francisco, California, who were stockholders in Chatterton and Son, Inc., the second.

All these various companies were in the same line of business. Chatterton and Son's principal office was at Lansing, Michigan. It was an elevator and warehouse business. A large portion of it was in handling beans. Some portion of the business was in grain. We had a grain department in Lansing, Michigan, and also a bean department. There was a manager at the head of each [219] separate department. At our country elevators, we also handled seeds, building material and supplies and coal. Our business generally was that of bean and grain jobbers. The grain business was a small portion of our business. We were referred to as the largest bean jobbers in the United States. We retailed coal and other materials. Seventy-five per cent of our business was beans.

(Testimony of H. E. Chatterton.)

When we first started in business, my father and I, we would take in fifteen car loads of grain to one car of beans. Later on we would take in fifteen car loads of beans to one car of grain. We only had one elevator at first. We did not do any jobbing business. We conducted what we termed a general elevator business. We gradually took on more elevators and worked into the jobbing end of it. From 1928 to 1931 we had thirty elevators or more. Nearly all of them were in Michigan. We did not handle any grain from growers in any states except Michigan. We did some jobbing business in other states, such as buying corn and oats in Illinois or Indiana, and selling it to the elevator people in Michigan. We bought beans in California, Idaho, New Mexico, Colorado, Nebraska, Wyoming, Montana, Kansas, New York, Maine, Wisconsin and Michigan. Our Lansing grain department bought grain in Illinois and Indiana. We had a terminal plant in Ohio. We bought a few beans in Ohio and tried to get the farmers there to develop and market and grow beans. We had a plant in Toledo which we used for processing beans, I mean hand picking them and preparing them for commercial grades.

We did not job coal. We handled coal, that is, we had a man in Lansing that looked after all our elevators in Michigan, and when one of them wanted a car load of coal, he would buy it and send it to this particular elevator.

(Testimony of H. E. Chatterton.)

We had thirty or more elevators in Michigan. They would handle beans that were bought in their immediate vicinity. [220]

Occasionally we would handle other commodities through Michigan. From 1928 to 1930 we had an extensive business. We had agents located at various sections working for us, but not in all of those states. For instance, Colorado was handled from the Kansas City office. Mr. Robert Healow was our agent here at Billings to handle this immediate territory.

The railroad companies required bonds, but not the states. Whenever the states did require bonds, we took them on. We depended upon our agents in the particular territories to advise us when and under what circumstances they needed a bond.

The bond here in question was handled through Mr. Healow here at Billings, and he notified me in reference to that. I do not remember having signed this particular application or bond. There was quite a number of them submitted to me for signature. I depended upon my subordinates to see that the forms were correct. I might modify that; of course these things were discussed when we opened up a new warehouse. And of course it was understood that where we operated warehouses that we had to have bonds, where the state required it, and also where we had cars coming in billed to our order, where they wanted the railroad companies to make the deliveries of the car without the orig-

(Testimony of H. E. Chatterton.)

inal bill of lading, which would save demurrage and delays. There is lots of times the cars would get in before the papers would come to the banks.

As to the number of employees we had from 1929 through 1931, it is pretty hard to say. For instance, at Toledo at different times of the year, there are a good many ladies hand picking, and then we would have two or three in the office and two or three in the plant. It would all depend on how busy we were. In a country elevator we figured on having two or three employees, but in the fall we had more. Our employees, outside of seasonal employees, I would say varied from twenty-five to fifty.

In the year 1929 our total sales were better than twenty [221] million dollars. Our assets in the way of elevators and warehouses were more than a million. I had quite a business in those days to have it get away from me over night.

On Plaintiff's Exhibit A, that is my signature, H. E. Chatterton. This "Chatterton and Son" was signed by Mr. Madsen, the secretary of the company. I remember receiving a letter from Mr. Healow stating that the Commissioner of Agriculture of the State of Montana demanded a bond and it was in reference to supplying this bond that I signed this application. This bond was issued.

We bought beans from the growers and other dealers and then sold them. Sometimes we sold them before we bought them. We also acted as

(Testimony of H. E. Chatterton.)

warehouseman for the growers here at Billings, at Toledo, Ohio and at our elevators in Michigan. At these places we did a warehouse business as distinct from the actual buying. I do not know what proportion of the beans during the years 1929, 1930 and 1931 were purchased outright and what proportion were placed in the warehouse under receipts here at Billings.

In reference to the beans being shipped from Billings, we would make a request on Mr. Healow for certain carloads of beans covering certain grades, and if he had them he would ship them.

Most of our warehouse receipts were issued in such a way that we did not agree to keep the identity of each different lot of beans intact. I know that after the failure, some shortage was found here at Billings, but I think that we had as many beans here as we had issued storage tickets for. I think that in June or July 1931 we had sufficient beans in this storage house to cover the storage receipts. That is, we meant to keep as many beans here as we had storage tickets for. That was our intention anyhow, and if they were not there, Mr. Healow had done that.

I do not know what proportion of the beans shipped during 1931, up to August in 1931, were purchased outright and what beans belonged to the growers, but I know that I hired Ernst and Ernst to come up here and check it up and it was hard to tell from the records [222] here just what

(Testimony of H. E. Chatterton.)

the status was. They reported that Mr. Healow did not keep his books just right. I do not know that of my own knowledge.

We did whatever bond business we had with the firm of Dyer-Jenison-Barry Company of Lansing, Michigan. We were rather intimate friends. I do mean to say Mr. Jenison could have particular familiarity with a firm of our size and caliber because we had known him for quite a good many years—ever since 1919—and we had been doing business with them twelve or fourteen years. He knew we had a grain department in Lansing. He knew that at times we engaged in handling coal and other materials. I would not say that he knew we engaged in handling grain and beans as well as other commodities over the United States because we did not deal in grain over the United States; just in Michigan, and we bought some oats and corn from Illinois to sell to the dealers in Michigan. I would not want to say that he knew that we bought grain and corn to sell to Michigan because the main part of our business was the bean business, over 75% of it,—probably even more than that. For instance, I have taken an order from the Campbell Soup Company for three quarters of a million dollars at one time. If Mr. Jenison made the statement that he understood we were engaged in the general bean and grain business I would say that would be correct.

(Testimony of H. E. Chatterton.)

It was the duty of the officers and agents of the company to determine what particular kind of bonds were to be issued in any particular line of business, and they in turn made application to the firm of Dyer-Jenison-Barry Company for the bond. This firm acted merely to procure the bond that our agents or officers asked for. We would make application to them and it was their business to get that particular kind of a bond. Mr. Jenison never had any position with our company. We gave this agency quite a bit of business. Personally, I do not know of a bond that we ever wrote outside of that company. It would not run into a big lot of money. There were some personal bonds, also. They also wrote the bonds that the railroads required. [223]

This firm carried on a sort of insurance business. They wrote some of our automobile insurance and on some of our plants. Our agent here, Mr. Healow, did not have a power of attorney for the company. He did not have any authority to sign the company's name except in issuing a warehouse receipt or something like that which were in a printed form with the name of Chatterton and Son, and he would put "per Mr. Healow."

We kept him posted as to what prices he should pay and he bought whatever was offered to him. He went out in the field and bought it up and then notified the company what he had purchased. He would draw a draft on the company to pay for it,

(Testimony of H. E. Chatterton.)

or he might send in the money and deposit it in the bank. He acted as our agent. Everything in this particular district was in his hands. Mr. Jenison was not so familiar with our business that he knew in every state of the Union what our business was limited to.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

We handled no grain whatever in Montana and none in this Billings warehouse. In the trade and colloquially a warehouse handling grain alone is called an elevator.

Q. And is that word "elevator" ever used in connection with the storage of beans?

Mr. BENNETT: I just want to register an objection there, that it is calling for a conclusion of the witness and he has not shown himself qualified to testify whether those terms are ever used.

The COURT: I will overrule your objection.

Mr. BENNETT: Exception.

A. No, not to my knowledge.

Q. And what is the expression used as known in the trade and colloquially used to describe or designate the place where beans are stored?

A. Warehouse.

Q. Is the word "warehouse" ever used in the trade or colloquially to designate a grain elevator or its equivalent? [224]

A. Not to my knowledge. I might say this, that the nature of the western beans is such that they

could not be handled in an elevator. They have to be handled in warehouses.

A place where beans are stored is known as a warehouse. To my knowledge, that word is never used to designate a grain elevator or its equivalent.

Western beans are of such character that they have to be handled in warehouses, due to the fact that the western bean has a very thin fibre on the outside and if they are handled in an elevator the slippage is terrific, and they have to be handled in bags and handled in such a way that they won't have that shrinkage; while the Michigan beans have a very tough wood fibre and they are handled in an elevator more like grain and none of the western varieties are handled that way. They are handled in sacks or bags.

We started out in what is known as a general elevator business, which was composed mostly of grain, and as years went on the farmers started raising more beans so that our business was mostly bean business instead of grain business. Our progress into the bean business was simply the progress of the business, no differently with us than with other dealers.

By 1930 the bean business was quite some business, not only with me, but generally. In the western states the bean business was of more recent growth. It has just been in the last few years, principally because of the development of the Great Northern bean, which has acquired a great

(Testimony of H. E. Chatterton.)

demand in the trade. This is an entirely different bean from the Michigan bean. We were known in the trade as the largest jobbers of beans, this was generally known and Mr. Jenison knew it.

This agency here at Billings was not Mr. Healow's business. The business belonged to Chatterton and Son. Mr. Healow was merely employed on a salary.

Q. Now I wonder, Mr. Chatterton, whether you have not gotten mixed up here somewhat with reference to the occasion for furnishing this [225] bond in the first place; and so as to refresh your memory and frankly suggesting to you that you may be confused with the year later when a bond was required by the Commissioner of Agriculture, I hand you a letter written by you for Chatterton & Son, Incorporated, from Kansas City, to Mr. Healow, dated April 18, 1931. If you will just read that and see if that refreshes your memory any?

A. Well, I had——

Q. Just before you answer it, I want to add something. Now I call your attention in particular that this bond was given in January 1930, a year and four months or thereabouts prior to the time referred to in that letter. Now then, getting back again to the occasion for giving the bond in January, 1930, is there anything you wish to correct, or were you right in the first place? I am not

(Testimony of H. E. Chatterton.)

suggesting it, I am merely inquiring, Mr. Chatterton.

A. Well, I don't think I just understand your question.

Q. Well, maybe I will have to lead you a bit. Is it not true, that as disclosed by that letter, that in April or thereabouts, 1931, the Commissioner of Agriculture of Montana was requesting of your agent, Mr. Healow, at Billings, a bond for this warehouse at Billings?

A. Yes, sir.

Q. And at that time it appears that in some manner or other it had been overlooked, that a bond had already been furnished?

A. Yes, sir; that is what this letter states.

Mr. BENNETT: Just a moment? I wish to strike the latter part of the answer of the witness on the grounds as to what the letter states. The letter is not in evidence, unless you wish to offer it.

Mr. WIGGENHORN: Yes, I will be glad to offer it. Just mark it for identification?

(Letter referred to marked "Exhibit B" for identification.)

Q. I hand you Exhibit B and will ask you to identify this document? [226]

A. Yes, sir.

Q. Just describe it, what is it?

A. It is a letter that I wrote to Mr. Healow replying to a letter that he had wrote to me in reference to a bond.

(Testimony of H. E. Chatterton.)

Q. And it bears your signature?

A. Yes, sir.

Q. And are the facts that appear therein true?

A. Yes, sir.

Mr. WIGGENHORN: In view of counsel's objection, I now offer the letter in evidence.

Mr. BENNETT: I want to offer a formal objection here. We object to the admission of Exhibit B on the grounds that it is a self-serving declaration and that it purports to state facts that have not been in evidence or testified to, and that it is not competent, relevant or material to the issues in this case, and that a part of this, the letter to which this purports to be a response, has not been offered in evidence or identified.

Mr. WIGGENHORN: May I say by way of argument, Your Honor, in reply to the objection that, as appears from the deposition, the previous question asked was, "And at that time it appears that in some manner or other it had been overlooked." And then Mr. Bennett objects to his testifying to that because the letter was not the best evidence, and then I offered the letter. And his objection now is that the letter is self-serving and incompetent, irrelevant and immaterial.

The COURT: Well, it seems to me that it may be material. You may want to raise a point on that.

Mr. WIGGENHORN: Shall I read the letter? [227]

(Testimony of H. E. Chatterton.)

The COURT: Yes.

(Exhibit B read by Mr. Wiggenhorn.)

Mr. WIGGENHORN: By the way, it is offered, Your Honor, merely to clear up the previous testimony, wherein he testified to the same facts occurring a year and four months earlier.

The COURT: Well, I think it would be material for that too. I will overrule the objection.

Mr. BENNETT: Note an exception.

EXHIBIT B

CHATTERTON & SON

Kansas City, Mo.
April 18, 1931.

Mr. R. J. Healow,
Chatterton & Son,
Billings, Mont.

Dear Mr. Healow:

We acknowledge receipt of yours of April 13th, relative to application for ten thousand dollar bond to be filed with the State of Montana, in order to obtain warehouseman's license.

Chatterton & Son filed this bond last year, and after Chatterton & Son, Inc. was organized, the bonding company wrote us relative to having this bond transferred from Chatterton & Son to Chatterton & Son, Inc., and we advised them that this

(Testimony of H. E. Chatterton.)

would be satisfactory. Under date of April 8th I received a letter from the bonding company's agents, The Dyer-Jenison-Barry Company of Lansing, which I am enclosing herewith. You will notice that the fourth paragraph of this letter speaks about this bond, and they will receive a letter in a day or two with the company's permission to make this change. In doing this it will save the premium on a new bond and should answer the requirements of the Secretary of the State of Montana.

If for any reason this does not cover your requirements, kindly take the matter up with us, but we feel confident that it will, and are therefore returning you herewith the application for a new bond with the Aetna Casualty and Surety Company.

Yours very truly,

CHATTERTON & SON, INC.

HEC:Q Per H. E. Chatterton.

I remember the occasion when this letter was written and it brings things to my mind. Using this letter to refresh my memory, it seems to me that the application was made for this bond, and after the bond was issued it was sent to Mr. Healow. By that I mean that the original bond, as I remember it, was made out and sent to Mr. [228] Healow. That was about a year before that. That would be

(Testimony of H. E. Chatterton.)

in 1930. Later on, Mr. Healow wrote us for a bond and I wrote back and told him that this bond had been issued and that he must have received it, and I also took up the matter with Mr. Jenison. I think this bond was later found in Mr. Healow's files. In April 1931, when this letter was written, a bond was demanded of our company. I then discovered that a bond had already been written and that is the bond that we are now talking about in this suit.

Q. Now then, getting back again to what you testified before, wherein you said that the occasion of writing the bond in the first instance, which was in January, 1930, more than a year prior to when you wrote this letter, was a demand in January, 1930, from the Commissioner of Agriculture for a bond. Do you wish to correct that, or is that still correct?

A. Well, no.

Q. Or do you know?

A. I do not know, but I have just a faint recollection of when this matter of a bond came up——

Mr. BENNETT: Just a moment, Mr. Chatterton; I want to object. The witness has testified that he did not know and I am going to object to any faint recollections as being an improper answer to the question which he already answered, and object to it as incompetent, irrelevant and immaterial.

The COURT: Well, I would have to sustain the objection to the faint recollection.

(Testimony of H. E. Chatterton.)

Q. Well, we will let the Judge and jury determine what the definiteness of your recollection is. You may tell us just what is in your mind, Mr. Chatterton?

Mr. WIGGENHORN: Is the objection sustained?

The COURT: Was there an objection there? [229]

Mr. WIGGENHORN: There was an objection made, and I did not let him answer. And I continued as I have just read.

The COURT: Well, I will sustain the objection on the ground that he says he had a faint recollection.

Mr. WIGGENHORN: Then he proceeds to answer, "As I remember." May I read that answer?

The COURT: Yes.

A. As I remember, we received a letter along in 1930 from Mr. Healow stating that he received a request by the Commissioner of Agriculture to furnish a bond in view of the fact that we were taking beans from the growers and issuing warehouse receipts and that led up to making application for the bond, and after this bond was issued I think that the bonding company mailed it to Mr. Healow and later on he wrote us.

Q. Well, now, I think that would be more or less hearsay. We won't go into that. I merely am trying to fix these times. Now then, as to the

(Testimony of H. E. Chatterton.)

faintness of your recollection or its accuracy, what can you tell us as to how authentic that recollection is? Might it be wrong? I am referring now as to whether or not any request was made by the Commissioner of Agriculture in January, 1930 for a bond?

A. Well, I might be wrong on that.

Q. But that is your present recollection?

A. Yes, sir.

Q. And you describe it as being faint?

A. Yes, sir; I cannot tell whether this request came from the Commissioner of Agriculture for a bond or not; but I know that Chatterton & Son was asked to furnish the bond.

Q. When you say "asked", do you mean asked by Healow, or by someone else? [230]

Mr. BENNETT: Just a moment, I am going to object to that as repetition. I believe the witness has already answered that he did not know whether the request was from the Commissioner or from Mr. Healow.

The COURT: Yes, sustained.

Q. Now that request, was that request communicated directly to you or through your company or through the medium of Mr. Healow?

A. Medium of Mr. Healow.

Q. So, I take it then that Mr. Healow would have first-hand information as to that?

A. Yes, sir.

Q. And what you have told us would be hearsay, I presume, from Mr. Healow?

(Testimony of H. E. Chatterton.)

A. Yes, sir.

Q. Or elsewhere?

A. Or elsewhere.

RECROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Chatterton, you did not mean in your testimony here given on redirect to say that when you refer to a warehouseman that you mean only storage of beans as distinct from grain; you did not mean to testify to that, did you?

A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

Mr. WIGGENHORN: Object to that as immaterial. "Warehouseman" was not the expression referred to.

The COURT: Yes, sustained.

Mr. BENNETT: Exception. [231]

I do not mean to say that warehouses do not have sacked grain, or grain stored therein, because they do in some instances in a small way, but where grain is stored, it is stored in bulk in bins, because if it is stored in sacks the loss would be tremendous on account of rattage and such as that. Generally grain is kept in an elevator in bins. In Michigan we put beans in an elevator because the texture of

(Testimony of H. E. Chatterton.)

those beans is different than the western beans, and in this western country we could not take a chance on storing beans in an elevator. These beans that I am talking about are eating beans. They are what we term as dry beans, commercial beans for food and canning purposes.

B. M. HARRIS,

a witness called in behalf of the plaintiffs, being first duly sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

My name is B. M. Harris. I am in the banking business in the Yellowstone bank at Laurel, and also one at Columbus. I have been in the banking business since 1907 at Park City. I have been president of the Yellowstone Bank for about ten years.

I was one of the members of the committee chosen at the time Chatterton and Son closed in 1931. I remember the occasion. I was present at the meeting of the growers that has been described by Mr. Appleby.

I was concerned because through the bank we had made loans on warehouse receipts and we were concerned about our collateral security. We held these warehouse receipts as collateral. We likewise had customers in our bank that were involved in this warehouse.

(Testimony of B. M. Harris.)

The first knowledge I had of the closing of the warehouse came from Mr. Kober, who had a large number of beans in the warehouse in Billings. He was one of our customers and we had a loan on those beans. He told us that he was concerned about the [232] standing of the company. I suggested that he go down to Billings and check up on his beans, and he reported that the beans were being shipped out of the territory. He and I both came down to Billings where I first called the warehouse and was informed that Healow was out and that Calkins, the auditor, was in charge. We made [233] a demand for settlement over the telephone for the beans at the market. Calkins advised us that it was being handled by his attorney, H. J. Coleman of Billings, and to take up the matter with him.

Coleman said there were no funds to pay for these beans and that they were being shipped to Kansas City. We came to Billings and checked and found that the beans were being loaded, so we went to the county attorney and insisted on the beans being tied up. Part of them had gone out and part of them were on the track. The mass meeting of the bean growers was held after that, that is, after the demand.

We demanded the county attorney to take some action to hold the beans and also to take action against the auditor, Calkins, on the ground that it was larceny to move those beans out of the state

(Testimony of B. M. Harris.)

for which we had warehouse receipts. Calkins was arrested and furnished a bond and was released. Then we notified Stafford's office and called a mass meeting at the Commercial Club in Billings.

At this meeting a committee was appointed and, as suggested by Stafford, it was given a formal power of attorney by practically all growers. I think with very few exceptions they gave the committee, all three, authority to act in their behalf in recovering the beans, that is, to take any action necessary to recover.

The cars that were tied up in Billings were mussed up and in some way slipped out and got on their way to Kansas City. We waited about thirty days trying to get a settlement.

Before that, we notified Mr. Stafford's office. He was in Missouri at a funeral. Then the committee notified him that they were in Kansas City and he stopped there on his way back and checked into the status of those beans in Kansas City. That was some time [234] in July, 1931 when Mr. Stafford was in Kansas City. He reported that the beans were in a federal warehouse there. Well, he found them in Chatterton's warehouse. Chatterton and Son made no representation to us at all as to how the beans that had been shipped out were being held. Healow was out and Calkins was gone. Our only contact had to be through Kansas City. Stafford was taking care of the communications through Kansas City to see whether

(Testimony of B. M. Harris.)

they would pay for the beans. I don't know what happened, but no settlement was made.

Mr. BENNETT: Defendant is willing to stipulate for the purposes of this record that between the 20th and 25th of July, 1931, demand was made on Chatterton & Son for the beans or their value, and Chatterton & Son failed and refused to redeliver or return said beans, excepting as plaintiff's testimony will show that they accounted for them, and excepting as the testimony shows Chatterton & Sons settled for them by assigning all of their assets.

I eventually went to Kansas City myself to recover on the storage tickets. You, Mr. Wiggenhorn, were with me in the capacity of the attorney for the growers. When we were in Kansas City we spent the entire forenoon with the attorney for Chatterton and Son, at which time he outlined the financial status of the company, showing that they were helplessly involved, that it was out of the question to replace or to pay these claims with beans, that the beans had been sold.

He told us there were approximately ten thousand bags of beans left which were in the warehouse in Kansas City under the supervision of the Radial Warehouse. [235]

The beans on hand had been hypothecated to the bank at Kansas City and they had to pay transportation to Kansas City and to pay Calkins out of it to keep him out of jail.

(Testimony of B. M. Harris.)

There were approximately eighteen cars involved in that last shipment to Kansas City by Calkins. It might have been twenty-two or twenty-three. We could account for about ten thousand bags of beans at Kansas City, but they were in the process of going. There were about twelve thousand bags shipped out by Calkins in the last year. The representatives of Chatterton and Son told us that the beans had been sold on a falling market and were just paying warehouse receipts as they were presented in these various territories until they had washed out with this bunch of beans in Billings.

They had warehouse receipts all over the Billings territory and part of Wyoming and they used those warehouse receipts in Kansas City. The beans represented by the warehouse receipts had been sold.

We did not take the warehouse receipts with us, but we took the records. We checked the beans in the warehouse and they did not check with the record, although they attempted to identify the beans. This was in the Chatterton warehouse. The secretary of the company went with us. We did not know our way about and someone from Chatterton and Son took us up to a pile of beans and said, "Here they are."

This was a large terminal warehouse in Kansas City only partially filled. There was a cleaning plant in operation and beans going to this cleaning

(Testimony of B. M. Harris.)

plant daily. The beans were stacked on the floor, part of them with Billings growers names on them, but the sacks did not check as to grades and they didn't check as to number of sacks. We were hopelessly at sea in trying to reconcile [236] the warehouse receipts at Billings with the sacks of beans at Kansas City. We could not identify a single sack for any particular grower.

In settlement, Chatterton and Son turned over to us first the equity in the warehouse beans on hand; that is, these beans were pledged to the bank in Kansas City. Before we could get any money out of them, they had to be sold and the pledge paid. We realized approximately ten thousand dollars from the ten thousand bags after the lien was paid. The lien was largely freight. We also got an assignment of the contract notes for some five thousand or fifty-five hundred dollars. That represented the sale price of the office equipment and good will, I mean the sale from Chatterton and Son, Inc., whose name had been changed to Gerson and Company and to the new Chatterton and Son.

We collected practically all of this, although the payments were slow and I made a second trip to Kansas City about two years later. They had to get the balance of the money from the San Francisco partners to clean up the notes. We realized about seven thousand dollars on the notes. These notes were given for bags and equipment

(Testimony of B. M. Harris.)

mostly. We had an assigned claim of the Occident Elevator in Billings. We cashed in six hundred dollars on that. We had an assigned claim from the Aetna Insurance Company for twenty-two hundred dollars for the Calkins bail bond. In order to indemnify the surety company, Chatterton and Son had to put up cash with the surety company, and after the charges were dismissed, that was turned over to us. Total amount collected was twenty-six thousand, four hundred dollars.

The committee had an expense of about thirty-three or thirty-five hundred dollars. That included attorney's fees and travelling [237] expenses. The attorneys fee was fifteen hundred dollars, with some expense account. The Department of Agriculture was short of funds, so we paid the expense of Moran from Great Falls and part of Stafford's expense. An audit of the account cost us three hundred dollars. The committee received practically nothing for their services. I received my expense account and the bank charged a service charge of about four hundred dollars. I would say that the whole amount was chargeable to the pursuit and recovery of the beans.

Mr. Stafford interceded in the first place and suggested that in order to make the formal set up we get a power of attorney from all growers, delegating the committee appointed at the Commercial Club to act in their behalf. Every grower of record was notified and I think every grower

(Testimony of B. M. Harris.)

signed up a power of attorney and at the same time sent in his warehouse receipt authorizing this committee to take such action as was necessary to recover the money and employ counsel for that purpose. We had authority to engage counsel.

The committee proceeded to collect and establish the amount of every loss and retain counsel to bring this action. Mr. Stafford went out of office a year ago. There has likewise been a change in the Attorney General's office. We first made application to Stafford to bring action on the bond and the matter was referred to the Attorney General's office, who agreed to bring this action for recovery. I think a claim was filed with the receiver of Chatterton and Son in Michigan. There has not been any collection from that source whatever. There has been nothing received or collected except what can be collected on the bond. [238]

CROSS-EXAMINATION

By Mr. BENNETT.

There are no assets left. We had exhausted everything in our possession. We disbursed the money in accordance with the power of attorney: dividend number one on the basis of a dollar a sack and dividend number two on the basis of forty cents a sack and we now have about forty-five hundred dollars cash on hand for distribution.

There was about a ten percent differential between payments on number one beans and number two beans. We have paid a total of about one

(Testimony of B. M. Harris.)

dollar and forty cents a sack on ninety-eights, and a proportionate reduction for ninety-sixes and ninety-twos.

We collected approximately twenty-six thousand four hundred dollars. Our expense was around thirty-four or thirty-five hundred dollars.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

This was the way we worked out the settlement. Some beans had no advance on them whatever. Other beans had advances up to four dollars a sack. In order to make an equitable settlement with the ticket holders, we eliminated all claims over a dollar in the first place and made the first distribution to the fellows that received less than one dollar; and the second distribution was made to the fellows that received less than $1.40.

In making our distribution we took into consideration the advances that had been made to the various growers. That is, if a man had received fifty cents a sack in advance, then we would only give him fifty cents more to make it a dollar. But if a man had received nothing, we gave him a full dollar per sack. If he had received over a dollar, we gave him nothing. This first dollar dividend embraced only a restricted number of growers, depending upon whether [239] they had had an advance or not. The next dividend of forty cents embraced a larger number because it took into

(Testimony of B. M. Harris.)
consideration whether they had received $1.40 in advance or not, and if they had, they got nothing.

RECROSS EXAMINATION

By Mr. BENNETT.

Every man got $1.40 either by way of an advance or by dividend.

REDIRECT EXAMINATION

By Mr. WIGGENHORN.

We paid out approximately ten thousand, seven hundred dollars on dividend number one, and about seven thousand on dividend number two.

RECROSS EXAMINATION

By Mr. BENNETT.

There were more who came under dividend number two than dividend number one because there were seven thousand bags involved, for instance, that had no advance of any kind. They participated in the first dividend to the extent of the full dollar. There were approximately forty thousand bags in outstanding storage tickets. There were no new growers came in for the first dividend. The list of growers and the list of losses were fixed, and whether they came in on the first or second dividend, the liability was fixed.

Witness excused.

W. W. LINDSAY,

a witness called for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. WIGGENHORN.

My name is W. W. Lindsay. I live here at Billings and I am a public accountant. I was employed by Mr. Stafford to audit the books of Chatterton and Son in 1931 when the warehouse was closed. The records of the company were turned over to me at that [240] time. I audited them and made a report from them. It took quite a lot of work. From the records and books of the company I made up a report that I submitted to Mr. Stafford, Commissioner of Agriculture.

Plaintiff's Exhibit 18 I believe is the original report, although it might be a copy of it. There were several copies made.

The first column shows the names of the bean growers from which I found warehouse receipts giving the number of sacks, etc. The list shows all of those for whom I found warehouse receipts in the records. The next column shows their addresses. The next column gives the total number of sacks that the warehouse receipts called for. It is designated as "No. Sax." The next column shows the grade as stipulated on the warehouse receipts. All of the warehouse receipts were called in and made available to me. The duplicates, of course, were in the records. The next column

(Testimony of W. W. Lindsay.)

shows the date of shipments of beans to Kansas City, according to the record of Mr. Healow. The next column shows the net weight of the sacks. When a bean grades ninety-six or better, it represents one hundred pounds to the sack.

We go down to the first 95. That happens to be Jake Benner, and he is credited with 320 sacks. If it was a hundred pounds to the sack, that would be 32,000 pounds. But the record shows only 30,400. In cases of that kind, they always figure those beans—at least that was the information imparted to me—they would figure out five per cent. Raise it up to a hundred; 32,000 pounds. Five per cent would be 1600 pounds. Subtract the 1600 pounds from the 32,000 pounds and you have the net weight of 30,400 pounds, as shown there.

That is to say, in this specific instance, you figured five per cent because the lot of beans is graded at 95, which means that five per cent of his beans were thrown out by the hand picking process, and that five per cent deducted from what would otherwise be the total of his beans, 32,000 pounds,—you arrive at [241] the 30,400 net weight. So that, in conclusion, we may say that, except for all beans grading ninety-six per cent or better, which would be a marketable bean immediately, where they graded ninety-six per cent, in reckoning the net weight you deducted that percentage of beans that would necessarily be picked to bring them up to a hundred per cent to arrive at your net weight. I

(Testimony of W. W. Lindsay.)

made this calculation for each individual grower, as an individual item and it is represented in my report here. [242]

The next column shows the market value at the time of shipment. I arrived at those figures from the prices that were stipulated on different various warehouse receipts given out by Mr. Healow on those particular dates. They were available in the Chatterton records.

The next column indicates the total net value after the hand picking reduction, that is, after deducting the five or eight per cent, or whatever it happens to be, in arriving at the net.

The next column shows the cash advances made. The next column shows miscellaneous charges, that is, some of it was for seed, and also for taxes. The last column shows the balance due at time of conversion. I arrived at this figure from the date of shipment to Kansas City.

The first one shown here is Winifred Annin, who had twenty-two sacks of beans graded at ninety-six, which means there would be no hand picked deduction. They were shipped on October 13, 1930. The gross weight was twenty-two hundred pounds. The market value at that date was four dollars. The total net value after hand picked deduction is eighty-eight dollars, or four dollars a sack. It shows a fifty-five dollar cash advance. Deducting that from eighty-eight dollars, you have thirty-three dollars, that being the balance due at

(Testimony of W. W. Lindsay.)

the time of conversion, and the same is true of the other growers as their claims are shown here on this report.

On the last page I have a form of recapitulation. In the column to the left I segregated all of the four fifty beans and four twenty-five and on down as low as two dollars, which was the lowest I noted on the warehouse receipts. This two dollar item represents ninety-six per cent beans, and I have separated, as appears here, all of the beans, classifying them by prices and the gross amount for each price classification. [243]

The gross amount as shown is 3,859,935 pounds, totaling $118,685.86, which was the total value of the beans. Deducting the total amount that it figured out for the hand picked charge at ten cents per pound, it was $12,678.03. This I deducted from the value of the beans, leaving $106,007.83. The total advances were $38,155.18. The miscellaneous charges were $2,009.08, totaling $40,164.26, which deducted from the net amount leaves a balance due the owners of beans in the amount of $65,843.57.

This report and the computations contained in it are based upon the theory that the beans were converted at the time of shipment from Billings. That is what was told to me at the time and that is what I based all my dates and figures on. Plaintiff's Exhibit 18 is the one I submitted to Mr. Stafford.

Mr. WIGGENHORN: We offer, then, in evidence Plaintiff's Exhibit 18.

(Testimony of W. W. Lindsay.)

Mr. BENNETT: May I ask some questions before this is received, Your Honor?

The COURT: Certainly.

VOIR DIRE EXAMINATION

By Mr. BENNETT.

I am not a certified public accountant.

In my testimony I did not say "that is what they told me." In my testimony I said that the two dollars in those different owners was the prices that I found and the prices that I set on the different bean owners' beans at the date they were shipped to Kansas City. If the price of a ninety-eight bean was $2.25, the regular prevailing price of the other was two dollars. This information was given to me by Mr. Healow and I think was shown in some of the other records. The prevailing price on a certain date I got from the records. [244]

I am not a bean man but it is characteristic, so far as I know, to figure the weight by subtracting. I could not say that part of this report and the calculations contained were based upon what was told me as to the manner that beans are handled. The market value on a given shipment and the dates therein contained, I procured from the warehouse receipts. The date of the shipments was shown in the sort of records of Chatterton and Son.

(Testimony of W. W. Lindsay.)

I have none of the original records with me. The records I went through, besides the duplicate warehouse receipts, were original warehouse receipts. The miscellaneous column I got from Chatterton's records, and they are correct. The column showing the advances I got from Chatterton's records. The amount of beans and the grades were also on the original receipts. This report was signed by me. I think this one is the original. I wrote a letter to Mr. Stafford and sent this to him.

DIRECT EXAMINATION RESUMED

By Mr. WIGGENHORN.

The records I have referred to are voluminous; in fact, they filled most of my office. I think I worked on this report for a month and a half, off and on.

Mr. BENNETT: If the Court please, I want to just object to the report as a report, in so far as the calculations shown in there are matters that were told him, in that for that reason the record as a whole does not appear to be merely ledger or book records taken from the books of the company.

The COURT: Well, I got that impression too, on the direct examination. But on the cross examination he explained the source of his information, and it does seem as if it came from the books and the [245] records that, under the system of conducting the business, that he must necessarily learn in going through the records.

(Testimony of W. W. Lindsay.)

Mr. WIGGENHORN: I think, Your Honor, you will find in going through the record that he was very careful in what information was given to him. He was merely asked as to the method. For example, I brought out that when he arrived at this price that he bases it upon the theory—something I, myself, told him for instance—that the conversion took place on the day of the shipment. Now, I merely told him, "You figure this out on that basis." And I think you will find that is true of all his statements where he says, "They told me." But the fact basis, I think, is authentic and the testimony will bear it out completely.

The COURT: I gathered that on the cross-examination. I thought Mr. Bennett went over pretty carefully with him those different matters, and I don't see how one could say it was hearsay or something somebody told him. I think I will overrule your objection.

Mr. BENNETT: Note an exception. [246]

EXHIBIT 18.

[PRINTER'S NOTE: Exhibit 18—Report on Chatterton and Son Storage Beans here set forth in the typewritten record is already set forth in the printed record at pages 18-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [247]

(Testimony of W. W. Lindsay.)

I also made computations figuring that the date of the conversion took place at the time the warehouse closed, at which time the price of beans was $2.25 for a number ninety-eight bean, and $2.05 for a ninety-six per cent bean. In arriving at this, I excluded from consideration all beans upon which there had been an advance of more than $2.25 for ninety-eights or $2.05 for ninety-sixes. I did not take into consideration advances of $2.25 or $2.05.

Q. Now then, taking into consideration only those beans that you thus had left after excluding the ones that had had an advance of $2.25 for ninety-eights and $2.05 for ninety-sixes, and considering a flat price of $2.25 for the remaining beans that graded number one on that date, and $2.05 for the remaining beans that graded ninety-six, and taking into consideration also the hand picked charges as deductions that you have already testified to, and deducting those; and deducting also the total advances and charges against those beans, did you arrive at the net value based upon that $2.25 base price?

Mr. BENNETT: Just a moment?

A. Yes, sir.

Mr. BENNETT: I will withdraw the objection.

Q. Now you may look at your own tabulations here, and I will ask you now to state what that net value thus calculated is?

(Testimony of W. W. Lindsay.)

Mr. BENNETT: Just a moment? Objected to, if the Court please, for the reason that there is a so called apparent hypothetical question, based on assumption of facts which I do not believe are proven, in trying to have this witness arrive at the measure of damages on a legal question; and also object to this as merely an opinion and conclusion of the witness, and not competent or material to the issues in this case. [252]

The COURT: He is arriving at a different basis on a different date? That is, this is the date of the closing of the warehouse?

Mr. WIGGENHORN: Giving ourselves the worst of it, Your Honor.

The COURT: Yes, that is what I thought.

Mr. WIGGENHORN: On the theory that if they say all they had to answer for was the price on the date of the closing of the warehouse; and presenting this matter to him for calculation, I ask him to state his conclusions from calculations.

The COURT: This theory is based upon facts, the same as the other?

Mr. WIGGENHORN: Absolutely, based upon facts, and against our interest. That is true. I want to say this to counsel, that this is a matter of calculation, and the Court has the right to calculate it for himself. That is to say, the report already in evidence discloses the facts that the witness himself used in the calculation, and it would take an accountant to figure it out. And I think there is no question, when we have such a compli-

(Testimony of W. W. Lindsay.)

cated set of figures, when they can be confirmed, that counsel or the Court can sit down and compute it. But I understand the witness can testify as to his calculation, for the convenience of the Court. Of course, it can all be checked. If it don't work itself out, it can be disproved by counsel.

The COURT: I will overrule the objection. [253]

Mr. BENNETT: Exception.

Q. Do you have the question in mind?

A. What was the question?

(Question read.)

A. $37,260.76.

CROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Lindsay, on your tabulation there, have you worked out any tabulation figuring the date of the conversion, say, the 15th or 17th of July, 1931?

A. I didn't quite get your question.

Mr. WIGGENHORN: Object to that question, Your Honor, because there would be no basis for the witness to make that computation; because he had no information to make that computation on.

Q. Well, let me ask you this question? Is this calculation that you are talking about there based on the market price of the beans around the 15th day of July, 1931?

Mr. WIGGENHORN: We object to that, Your Honor; the witness being incompetent to answer it, not qualified. His testimony shows that it is not

(Testimony of W. W. Lindsay.)

based upon a value at any given time. It is based upon a fixed hypothetical value of $2.25. It is not for this witness to say what the value of beans is on a given day, not being qualified.

The COURT: I think so. I think that is apparent.

Mr. BENNETT: Exception.

Q. Mr. Lindsay, how do you arrive at the basis of $2.25 as an hypothetical value to make your computation? [254]

Mr. WIGGENHORN: Objected to again, Your Honor, because that is the value I arbitrarily submitted to him for what it is worth. It isn't for him to arrive at. I arrived at it and the Court may or may not.

The COURT: I will have to sustain his objection.

Mr. BENNETT: Exception.

Q. Mr. Lindsay, did you fix the date as of July, 1931?

A. I did not.

The COURT: No, that is not it at all. He has just fixed a price. That is all there is to it.

From the records it was possible to determine whether or not any of the beans were actually sold to Chatterton and Son. There are none listed on the report if it was an actual outright sale. None of the actual sales are on this list. I found the cash advances as shown on Exhibit 18 from their records. I don't remember exactly what records the cash advances were in at this time, as that

(Testimony of W. W. Lindsay.)
was nearly five years ago and this has never been brought to my attention until four or five days ago. I got this from all of the different records there.

Witness excused.

B. M. HARRIS,

recalled as witness for plaintiff, having been previously sworn, testified as follows:

EXAMINATION

By Mr. WIGGENHORN.

At the time the warehouse closed the prevailing prices were $2.25 for ninety-eights and $2.05 for ninety-sixes. That was the price we got for the first beans sold in Kansas City. Afterwards the prices dropped. This price did, however, prevail for thirty days after the closing of the warehouse, that is, $2.25 for ninety-eights and $2.05 for ninety-sixes. [255]

CROSS-EXAMINATION

By Mr. BENNETT.

That was the price per hundred pounds.

Mr. WIGGENHORN: Plaintiff rests, Your Honor.

Mr. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Mary-

land, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defendant; for failure to prove that the so called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so called action.

The COURT: Well, the Court will take that under advisement—that motion. The Court will consider that motion in the case when it is submitted.

(Thereupon, documents were presented by counsel for defendant and marked as follows: "Defendant's Exhibit 23; Defendant's Exhibit 24"; and "Defendant's Exhibit 25," for identification.)

Mr. BENNETT: We offer in evidence defendant's exhibits, marked for identification "23, 24," and "25," purporting to be a letter from Healow to the Department of Agriculture, and a letter from the Department of Agriculture to the Secretary of the Montana Bean Dealers at Billings, and a letter from the Department of Agriculture to R. J. Healow: [256]

EXHIBIT 23.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow
Mont. & Wyo. Mgr.
Department of Agriculture,
Helena, Montana.

April 28, 1931.

Dear Mrs. Morris:

This will acknowledge receipt of your recent letter relative to the warehouseman's bond.

We are taking this matter up again with our Kansas City office and also with the Company who writes our bonds. Will endeavor to get prompt action on the same.

Yours very truly,

CHATTERTON & SON, INC.
(signed) R. J. HEALOW

RJH:BH

EXHIBIT 24.

COPY

Helena, Montana
April 14, 1931

Dorothy Gray Johnson, Secretary,
Montana Bean Dealers,
Billings, Montana.

Dear Mrs. Johnson:

This will acknowledge receipt of your letter of

April 9 and I have been discussing this matter with the Commissioner of Agriculture and the Attorney General before replying.

Since Mr. Stafford and I were in Billings we have had considerable correspondence with bean dealers, and with the exception of a very few they positively state that they do not store beans for the public. You are familiar with the agricultural seed warehouse act and understand that it covers only those who store and therefore we would have no jurisdiction over dealers who buy and sell and do not store. This is the opinion of our Attorney General. For several years we have been notifying the various dealers recommending that they observe this law, but only a few have complied, so you see the matter has not been neglected by this department.

There are so few who come under this act that it seems to me that it would be disastrous for the department to set rates for storage, handling and cleaning and so long as the law does not cover this point it would be impossible to enforce it. As to a uniform storage ticket for the few who will use it, I would recommend that you send a sample of the ticket you have been using for the approval of the Commissioner and the Attorney General. This has been done in a few instances. No doubt as the industry grows the dealers will see the necessity for a [257] change in the laws and make laws accordingly. In the meantime if you would keep

me posted as to who is storing beans in your locality I would endeavor to keep the bonds up to date.

Your statement as to the lax supervision of elevators is badly in error. All elevators handling stored grain are bonded, they file reports each month and bonds are filed according to liability. Out of practically 600 last year, one elevator got away from us, shipping their grain within a short period without permission from this department, giving us no opportunity to provide for additional bond. This happens in cases of banks or any business institution, even when inspectors are in the field giving close supervision. However, in the case I mentioned a charge for larceny has been filed so your statement seems unfair to me that the attitude should be taken that state bonds have not protected the growers. It is thru cooperation of our elevators that we keep a check on who is *operation* and who is not and the state can protect the bean growers in the same way if they will furnish us information as to who comes under bond or who is storing.

I am in accord with your judgment that it would be bad policy to go in and establish a uniform system as at this time we have so little knowledge as to the general practice of handling beans. Later after we have given the matter study the department and the bean growers may feel that supervision is necessary, but until that time I feel that supervision should extend entirely to keeping those storing

beans under bond, and with your help I am sure this can be done.

Very truly yours,

(signed) TOILIE MORRIS
Chief—Division Grain
Standards

TM-C

EXHIBIT 25.

COPY

April 24, 1931

R. J. Healow, Manager,
Chatterton & Son,
Billings, Montana.

Dear Mr. Healow:

In answer to your letter of April 21 I have called on the Secretary of State, and I find that last year Chatterton & Son filed their articles of incorporation with that office, but this in no way covers their operations as public warehousemen under the Warehouse Act. Whenever a corporation enters the state under the law they must file their articles with the Secretary of State's office and pay a fee, and this is no doubt what the company had in mind when they wrote you.

Very truly yours,

Chief—Division of Grain
Standards & Marketing

TM:C

[258]

Mr. WIGGENHORN: We object to defendant's Exhibit number 24, only, on the ground it is immaterial. The others are not objected to. And I might explain further, properly, my objection is only based upon the ground that, whether or not the Commissioner of Agriculture took the view that the principal in this bond did or did not come under his regulations is entirely immaterial.

The COURT: Well, it may go in subject to your objection, and I will consider it when I consider the rest of the case and these exhibits.

AUSTIN JENISON,

a witness called in behalf of the defendants, whose testimony was taken pursuant to stipulation of counsel upon written interrogatories by deposition, being first duly sworn, testified as follows:

My name is Austin Jenison; I am forty-two; I reside at 1608 Osborn Road, Lansing, Michigan. I am in the insurance business and have been in the insurance business for nineteen years.

In 1930 I was an officer of the Dyer-Jenison-Barry Company, insurance brokers. I was co-manager of the casualty and surety company. In 1930 I did some business with Chatterton and Son at Lansing, Michigan. It consisted of insurance and surety bonds.

(Testimony of Austin Jenison.)

In 1930 my firm were agents for the Fidelity and Deposit Company of Maryland. On or about January 7, 1930 I procured a surety bond for Chatterton and Son as principal, upon which the Fidelity and Deposit Company of Maryland was surety. I was requested to obtain the bond by one of the officers of Chatterton and Son, and after considerable correspondence with the home office and the Detroit branch of the Fidelity and Deposit Company, the bond was written on forms supplied by the State of Montana. [259]

Q. State, if you know, to whom said bond ran and kind of a bond it was?

Mr. WIGGENHORN: Plaintiff objects to direct interrogatory No. 10 on the ground that it is not the best evidence and the bond speaks for itself in this regard.

The COURT: Did he have the bond before him when this deposition was being taken? Read that question again?

(Above question read).

Mr. WIGGENHORN: I will add to the objection, calling for a conclusion as to the kind of bond it was.

The COURT: I think I will overrule the objection. He drew the bond. He has qualified himself to say what kind of bond it was, whether it was surety bond or what. Read the answer.

(Testimony of Austin Jenison.)

A. Assuming that Exhibit B is a copy of the bond supplied, it was furnished to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry of the State of Montana and was known as a Public Warehouseman's Bond. This written application for a Public Warehouseman's bond, marked for identification as "Defendant's Exhibit A", is a true and correct copy of the application of Chatterton and Son for said bond above referred to. This Public Warehouseman's bond, marked for identification as "Defendant's Exhibit B", seems to me to be a correct copy of the bond procured by me and referred to herein.

(Exhibit "A" here is in evidence as Plaintiff's Exhibit "A" at page 95, and Exhibit "B" above is here in evidence as Plaintiff's Exhibit 2 at page 13.)

[260]

Q. If you are able to identify the same, I will ask you whether or not, as far as you are concerned, there is any mistake in the form, wording and/or contents of said written Application and Bond?

Mr. WIGGENHORN: Objected to on the ground that it calls for a conclusion and as incompetent, and not the best evidence.

Mr. BENNETT: If the Court please, in this complaint they ask for reformation on the grounds that there was a mutual mistake of fact between the party issuing the bond and the people out here;

(Testimony of Austin Jenison.)

that they intended the word "beans" to be written in instead of "grain", and for that reason have asked this Court for a reformation. I don't know any more direct way than to ask the man who had the bond issued.

The COURT: I will consider that later, subject to the objection to it.

A. No. [261]

Referring to the next to the last clause of Exhibit B, wherein the following wording is used: "Now, therefore, if the said Chatterton and Son shall indemnify the owners of grain stored in said warehouses against loss," I will state that I did not intend to use the word "beans" instead of the word "grain" in said sentence.

Q. State whether, at the time you procured said bond, defendant's Exhibit B, you intended said bond as one for the protection of the owners of beans, instead of the owners of grain?

Mr. WIGGENHORN: Objected to upon the ground that the question assumes that the word "grain" is not a generic term, and it assumes that it does not include in its meaning the word "beans."

The COURT: Well, I will consider it later. I will receive it subject to the objection made, and I will disregard it or consider it.

A. No.

At that time I was familiar with the bean business of Chatterton and Son. They were brokers of beans, grain, hay and some produce.

(Testimony of Austin Jenison.)

On January 7, 1930 I did not know that Chatterton and Son's business was limited to the handling of beans in the State of Montana. It was my general impression that their business in Montana was a branch of their Lansing business, handling the same produce as was handled in Lansing.

CROSS-EXAMINATION

In January, 1930, and for a long time prior to that, I was well acquainted with Mr. H. E. Chatterton, the president of Chatterton and Son. I was an intimate friend of his and associated with him socially. [262]

I also had close business contacts with Mr. Chatterton and with Chatterton and Son. We wrote practically all of his bonding business. I was also an intimate friend of Mr. Madsen, the secretary of Chatterton and Son, of Mr. Stickle, vice president of Chatterton and Son, and Mr. Reynolds, the attorney for Chatterton and Son. I presume that Mr. Stickle was the manager of the bean department at that time.

As a result of our business and social contacts, I was familiar with the character of the business of Chatterton and Son in a general way. I knew the company was engaged in the bean business and was reputed to be one of the largest bean jobbers in the country. I knew the company had opened up a western branch, but did not know it was exclusively for the handling of beans.

(Testimony of Austin Jenison.)

Q. Did you not in fact know and understand that Chatterton & Son were not engaged in operating any grain elevators in the State of Montana or in any of their western branches?

A. No.

Q. If, in answer to any of the questions, you have stated that you understood that the business of Chatterton & Son in Montana was the handling of grain or of grain and beans both, will you please state who ever told you that the Company handled grain in Montana or where you got that information or that impression?

A. I assumed they handled the same commodities they handled in Lansing and I do not recall that anyone in particular discussed the matter definitely.

Q. I call your attention to the written application of Chatterton & Son for this bond in question, and particularly to the statement therein that the nature of the bond sought was a public warehouseman's bond. Did you or any one on behalf of your firm, at the time, inquire particularly as to what kind of a warehouse was there meant or was intended to be covered by the bond, and for the storage of what kind of goods or property; and if you did obtain any such [263] information, state who furnished the information to you and what you learned in that connection?

A. No, but the fact that a so-called public warehouseman's bond was supplied by the State of Montana gave me the general impression that various

(Testimony of Austin Jenison.)

commodities were to be stored in the warehouse.

Q. In supplying this bond, was it of any interest to you or to your firm to determine precisely whether beans or grain were to be stored in the warehouse to be protected by the bond?

A. No. It would make no difference to me, but it might to the bonding company. [264]

Mr. WIGGENHORN: If Your Honor please, I ask that the answer to interrogatory number 16—that everything be stricken therefrom after, "No, it would make no difference to me?" Striking particularly the words, "but it might to the bonding company," as not responsive to the question asked, and purely argumentative.

The COURT: Yes, strike it out.

Mr. BENNETT: Exception.

Q. In furnishing the bond, did it, in fact, make any difference to you or your firm or enter into your decision to write the bond, whether the property to be stored in the warehouse was to be wheat or other cereal grains, or beans, or both?

A. I can answer that it would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: Again, I ask that the words, "but it might to the bonding company," be stricken from the answer as not responsive, and argumentative.

The COURT: Yes, it isn't responsive. Let it go out.

Mr. BENNETT: Exception.

(Testimony of Austin Jenison.)

I received several letters from Mr. Healow, manager of the Billings warehouse of Chatterton and Son, over a period of several months, but I would not be able to identify the month without referring to my file.

The first letter from Mr. Healow is dated December 17, 1929, written from Billings, Montana; written, however, to Chatterton and Son and forwarded to me, "Austin Jenison please note," which I am having marked "Exhibit C," and offered as an exhibit. There is another letter dated April 28, 1931, from R. J. Healow to Dyer-Jenison-Barry Company, which I am having marked "Exhibit D," and [265] offered as an exhibit. These are the only two letters which I find in the file from Billings, Montana, relative to this bond.

Q. Did not the letterhead in fact show and state Chatterton & Son to be or claim to be the largest bean dealers in the world?

A. The letter, Exhibit C, did not so claim; while the letter, Exhibit D, did make the claim.

Q. Please produce the letter or letters, mark them for identification, and attach them to your deposition as exhibits.

A. I have so marked and produced the letters.

Mr. BENNETT: We now offer the two letters attached to that deposition as evidence, Exhibits C and D.

(Testimony of Austin Jenison.)

EXHIBIT C.

CHATTERTON & SON
Beans, Grain, Hay
and Produce

R. J. HEALOW
Manager

Billings, Montana
December 17, 1929

Chatterton & Son,
Lansing, Michigan,

Dear Mr. Madsen:

This will acknowledge receipt of your letter regarding the bond in connection with the warehouse license.

You might have the Dyer-Jenison & Barry Company mail the bond to this office and we will remit the necessary funds to obtain the license.

Yours very truly,

CHATTERTON & SON,
(signed) R. J. Healow [266]

RJH:BH

(Testimony of Austin Jenison.)

EXHIBIT D.

CHATTERTON & SON
Largest Bean Dealers in the World
BILLINGS, MONTANA

R. J. Healow,
Mont. & Wyo. Mgr.

April 28, 1931

Dyer-Jenison-Barry Co.,
Lansing, Michigan.

Attention: Mr. Jenison,

Gentlemen:

Your letter of April 8th, 1931 addressed to Mr. H. E. Chatterton at North Kansas City, has been mailed to us relative to a warehouseman's bond which we should have filed with the Secretary of Agriculture at Helena, Montana.

We note in the fourth paragraph of this letter where you mention a warehouseman's bond. We have taken this matter up with the Secretary of Agriculture at Helena and he called on the Secretary of State relative to this bond. He informed us there never was a warehouseman's bond filed in Montana by Chatterton & Son.

We would like to have this matter straightened out and have taken the privilege of writing you direct instead of having the correspondence go through the Kansas City office.

(Testimony of Austin Jenison.)

We would appreciate a reply and kindly ask that you send a copy of the correspondence with us to our Kansas City office.

Yours very truly,

CHATTERTON & SON, INC.,

RJH:BH (signed) R. J. Healow

Mr. WIGGENHORN: No objection.

The COURT: They will be received.

Mr. BENNETT: The defendant rests.

The COURT: Any rebuttal?

Mr. WIGGENHORN: None, Your Honor; but I would like to make a record as to findings. Plaintiff at this time, at the close of the evidence, requests the Court to make findings in favor of the plaintiff, as follows: [267]

That it is the intention of all parties, including the defendant company, in using the word "grain" in the bond in question in its broad and generic sense, to include beans; and that all parties concerned meant to include beans in particular.

That it be further found that by mistake the word "grain" was used, although probably not the most appropriate word; and that the precise agricultural commodity, whether beans or wheat, was of no consequence to the defendant, and did not enter into its consideration in writing the bond.

That the Court further find generally on all of the facts for the plaintiff.

And plaintiff further asks, as conclusions of law, that the Court find that the defendant intended by the bond and continuation certificate to indemnify the owners of stored beans, and particularly the persons named in Plaintiffs' Exhibit 18, against the loss of the beans and the failure to deliver them upon demand or to account for the same.

That the Court further conclude that the bond should be reformed by changing the word "grain" to the word "beans"; and that the Court find that the bond was duly delivered and became effective and binding upon the defendant during the entire time while the beans in question were delivered to Chatterton & Son, or Chatterton & Son, Incorporated, for storage and at all times since. [268]

That the condition of the bond was breached and its penalty has attached; and that the plaintiff is entitled to recover the sum of ten thousand dollars, with interest at six per cent. since July 16, 1931, as prayed for; and that judgment be entered accordingly.

Mr. BENNETT: If the Court please, at this time I would like to renew, for the purposes of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows

no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined.

The COURT: Well, I will take that motion under advisement.

Mr. BENNETT: If the Court please, under my view, we have a mixed case of equity and law, and I have not prepared any application for findings of fact and conclusions of law. [269]

The COURT: Well, you may do so.

Mr. BENNETT: May I have ten days in which to prepare and offer findings?

The COURT: Yes.

(Discussion off the record as to time necessary for submission of briefs.)

Mr. WIGGENHORN: I will take 15 days, if that is agreeable.

Mr. BENNETT: I will take 15 days from time of receipt of his brief.

The COURT: Very well, then, and 15 days for reply, if necessary. And we have a Court rule which provides that preceding the argument there should be a succinct statement of the facts; that is, I mean the material things to be considered, so that they will all be brought prominently to the attention of the Court right at the beginning. Some lawyers don't always follow that rule. But if you will, make a very brief statement, and that brings

the salient features right out prominently at the beginning of the brief. You gentlemen probably would do that to begin with. I haven't seen that rule for a long time, but I just happened to think that it isn't a bad idea. Well, that seems to be all. [270]

And thereafter, on the 5th day of February, 1936, the defendant did file its proposed Request for Findings, as follows:

"REQUEST FOR FINDINGS.

Comes now the defendant in the above entitled cause and hereby requests the Court that, in rendering and making its judgment in the above entitled cause, which has been submitted to the Court, said Court makes specific findings of fact and law upon the following issues included in said cause, as follows:

FINDING OF FACT.

I. That for many years prior thereto and during the years 1929 and 1930 Chatterton & Son was a corporation, engaged extensively over the United States, buying, handling and storing of beans, grain, hay, coal and building materials, with principal place of business at Lansing, Michigan.

II. That on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company

of Maryland for a Public Warehouseman's bond to the State of Montana.

III. That on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain.

IV. That at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana.

V. That said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and [271] contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen.

VI. That neither said bond nor any renewal thereof was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry thereof.

VII. That no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued

by the State of Montana, nor any department thereof, to said Chatterton and Son to engage in business as public warehousemen, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all.

VIII. That Chatterton & Son and its subsidiaries, during the time set forth in the complaint, engaged in the handling and storing of beans.

FINDINGS OF LAW.

I. That said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

II. That said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof.

III. That there exists no basis for the plaintiff making claim under said bond.

IV. That there exists no basis for a reformation of said bond.

Respectfully submitted this 4th day of February, 1936.

WEIR, CLIFT, GLOVER
& BENNETT,
Attorneys for Defendant." [272]

And thereafter, on the 10th day of September, 1936, the Court made the following decision:

[PRINTER'S NOTE: "Decision of the Court here set forth in the typewritten record is already set forth in the printed record at pages 113-124, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [273]

[Title of Court and Cause.]

"STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the respective parties above named, that the above named defendant, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the Judgment and Decree [280] of the above entitled Court, made and entered on September 10th, 1936.

R. G. WIGGENHORN
Attorneys for Plaintiffs.
WEIR, CLIFT &
BENNETT,
Attorneys for Defendant."

[Title of Court and Cause.]

"PETITION.

Comes now the defendant above named, FIDELITY AND DEPOSIT COMPANY OF MARY-

LAND, and moves this Court that it may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the decision and Decree of the above entitled Court, in favor of the plaintiff and against the Defendant, filed herein on the 10th day of September, 1936.

Dated this 14th day of September, 1936.

WEIR, CLIFT &
BENNETT
Attorneys for Defendant."

(Filed September 15th, 1936.)

[Title of Court and Cause.]

"ORDER.

Upon application of defendant, IT IS HEREBY ORDERED, that said defendant, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, may have to and including the 20th day of October, 1936, in which to prepare, serve and file its Bill of Exceptions to the Decree and Judgment of this Court, made and entered on the 10th day of September, 1936.

Dated this 15th day of September, 1936.

CHARLES N. PRAY
JUDGE."

(Filed September 15th, 1936.)

AND NOW, within the time allowed by law and as extended by Orders of the Court, the defendant

excepts to the decision of the Court and presents this, its proposed Bill of Exceptions, and asks that the same be signed, settled and allowed as true and correct.

Dated this 20th day of October, 1936.

WEIR, CLIFT &
BENNETT,
Attorneys for Defendant. [281]

The undersigned attorneys, for and on behalf of plaintiffs in the above entitled case, do hereby acknowledge service of the above and foregoing Bill of Exceptions this 17th day of October, 1936.

R. G. WIGGENHORN
Attorneys for Plaintiffs.

[Title of Court and Cause.]

ORDER

Good cause having been shown, IT IS HEREBY ORDERED, that the date for the settlement of the defendant's proposed Bill of Exceptions, heretofore set and noticed for settlement at Great Falls on November 20th, 1936, at 10:00 o'clock A. M., is hereby extended to, and the date of settlement is hereby set for November 30th, 1936, at the Court Room of this Court, at Great Falls, Montana, at 10:00 o'clock A.M.

Dated this 20th day of November, 1936.

CHARLES N. PRAY
Judge.

(Filed November 20th, 1936.)

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED, by and between the respective parties hereto, that the foregoing Bill was served upon the attorneys for the plaintiffs on the 17th day of October, 1936; that thereafter and on the 26th day of October, 1936, the said plaintiffs, through their attorneys, served and filed herein its proposed Amendments thereto. That thereafter, by stipulation of counsel herein and by orders of said Court, the time for settlement of said Bill and the trial term of this Court having been extended, the said Bill was by agreement amended and said amendments incorporated therein so that the foregoing Bill of Exceptions as so amended contains all the [282] evidence given and the proceedings had on the trial of this action; that it is a correct statement of the evidence in said case and is correct in all respects, and that the same may be approved, allowed, settled and ordered filed and made a part of the record herein by the Judge before whom the cause was tried, without further or other notice to the parties or their counsel, and

they do hereby waive the right to be present at the settling and allowance of said Bill.

November 21st, 1936.

R. G. WIGGENHORN
Attorneys for Plaintiffs.
WEIR, CLIFT &
BENNETT
Attorneys for Defendant.

The above and foregoing Bill of Exceptions having been duly and regularly filed with the Clerk of said Court and thereafter duly and regularly served within the time authorized by law, and that due and regular notice of time for settlement and certifying said Bill of Exceptions having been given and the same having been presented for settlement within the time allowed by law and the term of this Court, as extended by the orders of this said Court;

IT IS HEREBY ORDERED, that the above and foregoing be and the same is herewith duly signed, certified and allowed as the Bill of Exceptions and statement of the evidence in said case, and as being true and correct, and the same is hereby made a part of the record in said cause, and ordered filed as such.

Done this 30th day of November, 1936.

CHARLES N. PRAY
Judge who presided at said Trial.

Lodged in Clerk's office Oct. 19, 1936.
[Endorsed]: Filed Nov. 30, 1936. [283]

Thereafter, on December 8th, 1936, PETITION FOR APPEAL was duly filed herein as follows, to wit: [284]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the District Court of the United States, in and for the District of Montana:

Comes now Fidelity and Deposit Company of Maryland, a corporation, defendant above named, and petitions the Court for an appeal herein, and respectfully represents:

That on the 10th day of September, 1936, the Court filed its written opinion herein and thereafter, on the 19th day of September, 1936, a final Decree or Judgment was entered in the above cause against the petitioner and in favor of the plaintiff, ordering and adjudging that the plaintiff herein do have and recover of and from the defendant the sum of Thirteen Thousand, One Hundred and no/100 Dollars ($13,100.00), together with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, and for costs.

That said defendant, conceiving itself aggrieved by said [285] Decree aforesaid, respectfully represents:

That certain errors were committed in the said Decree or Judgment and proceedings had prior thereto, to the prejudice of said defendant, all of which more fully appears from the Assignment of Errors which is filed herewith.

WHEREFORE, petitioner prays that an appeal may be allowed to it from the said rulings of the Court and said Decree, and from every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit; that its appeal be allowed and citation be issued, as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rulings of said Court in said cases made and provided; and also that an order be made, fixing the amount of the security which the defendant shall give and furnish upon said appeal and that, upon the giving of such security, all future proceedings of this Court be suspended and stayed until the determination of the appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1936.

WEIR, CLIFT &
BENNETT,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 8, 1936. [286]

Thereafter, on December 8th, 1936, ASSIGNMENT OF ERRORS was duly filed herein, as follows, to wit: [287]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the said Fidelity and Deposit Company of Maryland, a corporation, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause and from the decree of this Court, entered on the 19th day of September, 1936.

I.

The Court erred in overruling defendant's objections and motion to strike plaintiffs' proposed amended complaint.

II.

The Court erred in allowing plaintiff to file its amended complaint in this case.

III.

The Court erred in overruling defendant's motion to dismiss the amended complaint of plaintiffs, filed in this case.

IV.

The Court erred in sustaining plaintiffs' motion to strike [288] from defendant's answer the first and second affirmative defenses therein contained and by deciding the facts stated in said affirmative defenses were not sufficient to constitute a defense to the cause of action stated in plaintiffs' amended complaint.

V.

The Court erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial thereof, on the grounds that the complaint failed to state a cause of action, either in law or equity, against the defendant and that there was a defect in parties plaintiff and defendant.

VI.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 2, as follows:

"Mr. WIGGENHORN: I offer Plaintiff's Exhibit 2 in evidence.

Mr. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with the Secretary of Agriculture or any other department of the State of Montana.

The COURT: I suppose some proof with reference to that will come later?

Mr. WIGGENHORN: Yes, Your Honor.

The COURT: As to what was done with it?

Mr. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

The COURT: Promptly?

Mr. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in

fact, after the beans were deposited, with the Commissioner. In the orderly proof we will present that.

The COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

[PRINTER'S NOTE: Exhibit 2—Bond No. 3591931 here set forth in the typewritten record is already set forth in the printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [289]

VII.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 3, as follows:

"Mr. WIGGENHORN: We likewise offer Plaintiff's Exhibit 3.

Mr. BENNETT: Of course, we admit that that was executed, Your Honor; and without repeating objection, I merely want to repeat the objection is made to the original bond as going to the renewal certificate.

The COURT: And this will also be received and considered, subject to your objection. [290]

EXHIBIT 3.

[PRINTER'S NOTE: Exhibit 3—Continuation Certificate No. 5809 here set forth in the typewritten record is already set forth in the printed record at pages 16-17, and is, pursuant to stipulation of

counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

VIII.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

"Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond?

Mr. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any manner and not shown to have been made in the presence of any of the parties to this action.

The COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and [291] that their product would be secure, if stored there.

Mr. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

The COURT: Yes, I will overrule the objection.

Mr. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to

the growers in this territory. It would apply to anyone who asked me."

IX.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

"Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse?

Mr. BENNETT: Just a moment; we make the same objection, and on the ground of it being hearsay testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

The COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did."

X.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"Q. And did you at any time during your work for any companies other than Chatterton and Son ever make application for license to do business as a public warehouseman?

Mr. WIGGENHORN: Object to that as immaterial.

The COURT: Wasn't that stricken out of the pleadings, wasn't that set up in a separate and distinct answer that I sustained a motion to?

Mr. WIGGENHORN: That is correct.

The COURT: Well, I will sustain the objection.

Mr. BENNETT: Note an exception." [292]

XI.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"Q. Will you state, if you know, Mr. Healow, whether or not you made application in the State of Wyoming for Chatterton and Son to do business under the laws of the State of Wyoming?

Mr. WIGGENHORN: The same objection, immaterial.

The COURT: The same ruling.

Mr. BENNETT: Note an exception. If the Court please, I was just following this as a matter of clearing myself on this. This man testified that he asked for Chatterton and Son to secure a bond because it had been his practice in the past, and I wanted to ask him about that, where and when he had done that.

The COURT: Yes. Well, you have. He said he got a bond for a certain purpose."

XII.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"RECROSS-EXAMINATION

By Mr. BENNETT.

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

Mr. WIGGENHORN: I object to that as immaterial.

The COURT: Sustain the objection.

Mr. BENNETT: Note an exception.

The COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

Mr. BENNETT: Well, I believe, if I might show, that this man will say that those were procured to file with the State of Montana.

XIII.

The Court erred in permitting the introduction in evidence of [293] plaintiffs' Exhibit 1, as follows:

"The COURT: Yes. What is the objection to it?

Mr. BENNETT: The general objection that it is incompetent, irrelevant and immaterial, in that it is not shown that the original bond or the renewal certificate has been filed with the Department of Agriculture or approved, or that a license to do business in the State of Montana has been issued to Chatterton and Son.

The Court: Very well, it may be received in the same manner, and you may have the exception.

Mr. BENNETT: Yes, exception.

EXHIBIT 1.

[PRINTER'S NOTE: Exhibit 1—Re: No. 3591931—Chatterton & Son—here set forth in the typewritten record is already set forth in the printed record at pages 179-180, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.]

XIV.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

"Q. And did that in any way enter into your determination and [294] conclusion to put the beans in that warehouse?

Mr. BENNETT: Just a moment? That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

Mr. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given.

The COURT: I think so. Overrule the objection.

Mr. BENNETT: Note an exception.

A. It did."

XV.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

"WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(Mr. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.

The COURT: That may be understood; and it is overruled, and it is excepted to.)"

XVI.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

"My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

Mr. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course?

Mr. BENNETT: Yes.
The COURT: All right. [295]

XVII.

The Court erred in permitting in evidence the plaintiffs' Exhibit B", as follows:

"Mr. WIGGENHORN: In view of counsel's objection, I now offer the letter in evidence.

Mr. BENNETT: I want to offer a formal objection here. We object to the admission of Exhibit B on the grounds that it is a self-serving declaration and that it purports to state facts that have not been in evidence or testified to, and that it is not competent, relevant or material to the issues in this case, and that a part of this, the letter to which this purports to be a response, has not been offered in evidence or identified.

Mr. WIGGENHORN: May I say by way of argument, Your Honor, in reply to the objection that, as appears from the deposition, the previous question asked was, "And at that time it appears that in some manner or other it had been overlooked." And then Mr. Bennett objects to his testifying to that because the letter was not the best evidence, and then I offered the letter. And his objection now is that the letter is self-serving and incompetent, irrelevant and immaterial.

The COURT: Well, it seems to me that it may be material. You may want to raise a point on that.

Mr. WIGGENHORN: Shall I read the letter?
The COURT: Yes.
(Exhibit B read by Mr. Wiggenhorn.)

Mr. WIGGENHORN: By the way, it is offered, your Honor, merely to clear up the previous testimony, wherein he testified to the same facts occurring a year and four months earlier.

The COURT: Well, I think it would be material for that too. I will overrule the objection.

Mr. BENNETT: Note an exception.

EXHIBIT B.

[PRINTER'S NOTE: Exhibit B—Re: acknowledgement of receipt for bond here set forth in the typewritten record is already set forth in the printed record at pages 210-211, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [296]

XVIII.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit evidence to be introduced, as follows:

"A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

Mr. WIGGENHORN: Object to that as immaterial. "Warehouseman" was not the expression referred to.

The COURT: Yes, sustained.

Mr. BENNETT: Exception."

XIX.

The Court erred in overruling the defendant's objection to plaintiff's question and permitting the introduction of evidence as follows:

"The records I have referred to are voluminous; in fact, they filled most of my office. I think I worked on this report for a month and a half, off and on.

Mr. BENNETT: If the Court please, I want to just object to the report as a report, [297] insofar as the calculations shown in there are matters that were told him, in that for that reason the record as a whole does not appear to be merely ledger or book records taken from the books of the company.

The COURT: Well, I got that impression too, on the direct examination. But on the cross-examination he explained the source of his information, and it does seem as if it came from the books and the records that, under the system of conducting the business, that he must necessarily learn in going through the records.

Mr. WIGGENHORN: I think, Your Honor, you will find in going through the record that he was very careful in what information was given to him. He was merely asked as to the method. For example, I brought out that when he arrived at this price that he bases it upon the theory—something I, myself, told him for instance—that the conversion took place on the day of the shipment. Now, I merely told him, "You figure this

out on that basis." And I think you will find that is true of all his statements where he says, "They told me." But the fact basis, I think, is authentic and the testimony will bear it out completely.

The COURT: I gathered that on the cross-examination. I thought Mr. Bennett went over pretty carefully with him those different matters, and I don't see how one could say it was hearsay or something somebody told him. I think I will overrule your objection.

Mr. BENNETT: Note an exception. [298]

EXHIBIT 18.

[PRINTER'S NOTE: Exhibit 18—Report on Chatterton & Son Storage Beans here set forth in the typewritten record is already set forth in the printed record at pages 18-21, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.] [299]

XX.

The Court erred in overruling the defendant's objection to plaintiff's question and permitting the introduction of evidence, as follows:

"Q. Now you may look at your own tabulations here, and I will ask you now to state what that net value thus calculated is?

Mr. BENNETT: Just a moment? Objected to, if the Court please, for the reason that there is a so-called apparent hypothetical question, based on assumption of facts which I do not believe are proven, in trying to have this witness arrive at the measure of damages on a legal question; and

also object to this as merely an opinion and conclusion of the witness, and not competent or material to the issues in this case.

The COURT: He is arriving at a different basis on a different date? That is, this is the date of the closing of the warehouse?

Mr. WIGGENHORN: Giving ourselves the worst of it, Your Honor.

The COURT: Yes, that is what I thought.

Mr. WIGGENHORN: On the theory that if they say all they had to answer for was the price on the date of the closing of the warehouse; and presenting this matter to him for calculation, I ask him to state his conclusions from calculations.

The COURT: This theory is based upon facts, the same as the other?

Mr. WIGGENHORN: Absolutely, based upon facts, and against our interest. That is true. I want to say this to counsel, that this is a matter of calculation, and the Court has the right to calculate it for himself. That is to say, the report already in evidence discloses the facts that the witness himself used in the calculation, and it would take an accountant to figure it out. And I think there is no question, when we have such a complicated set of figures, when they can be confirmed, that counsel or the Court can sit down and compute it. But I understand the witness can testify as to his calculation, for the convenience of the Court. Of course, it can all be checked. If it don't work itself out. it can be disproved by counsel.

The COURT: I will overrule the objection.

Mr. BENNETT: Exception.

Q. Do you have the question in mind?

A. What was the question?

(Question read.)

A. $37,260.76." [304]

XXI.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit the introduction of evidence, as follows:

"CROSS-EXAMINATION

By Mr. BENNETT.

Q. Mr. Lindsay, on your tabulation there, have you worked out any tabulation figuring the date of the conversion, say, the 15th or 17th of July, 1931?

A. I didn't quite get your question.

Mr. WIGGENHORN: Object to that question, Your Honor, because there would be no basis for the witness to make that computation; because he had no information to make that computation on.

Q. Well, let me ask you this question? Is this calculation that you are talking about there based on the market price of the beans around the 15th day of July, 1931?

Mr. WIGGENHORN: We object to that, Your Honor; the witness being incompetent to answer it, not qualified. His testimony shows that it is not based upon a value at any given time. It is based upon a fixed hypothetical value of $2.25. It is not

for this witness to say what the value of beans is on a given day, not being qualified.

The COURT: I think so. I think that is apparent.

Mr. BENNETT. Exception."

XXII.

The Court erred in sustaining the plaintiffs' objection to defendant's question and refusing to permit the introduction of evidence, as follows:

Q. Mr. Lindsay, how do you arrive at the basis of $2.25 as an hypothetical value to make your computation?

Mr. WIGGENHORN: Objected to again, Your Honor, because that is the value I arbitrarily submitted to him for what it is worth. It isn't for him to arrive at. I arrived at it and the Court may or may not.

The COURT: I will have to sustain his objection.

Mr. BENNETT: Exception."

XXIII.

The Court erred in overruling defendant's Motion for Dismissal of the action, made at the end of plaintiffs' case, as follows: [305]

"Mr. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Maryland, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defend-

ant; for failure to prove that the so-called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so-called action."

XXIV.

The Court erred in sustaining plaintiffs' Motion to Strike the evidence of defendant, as follows:

"Q. In supplying this bond, was it of any interest to you or to your firm to determine precisely whether beans or grain were to be stored in the warehouse to be protected by the bond?

A. No. It would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: If your Honor please, I ask that the answer to interrogatory number 16—that everything be stricken therefrom after, "No, it would make no difference to me?" Striking particularly the words, "but it might to the bonding company," as not responsive to the question asked, and purely argumentative.

The COURT: Yes, strike it out.

Mr. BENNETT: Exception."

XXV.

The Court erred in sustaining plaintiffs' Motion to Strike the evidence of defendant, as follows:

"A. I can answer that it would make no difference to me, but it might to the bonding company.

Mr. WIGGENHORN: Again, I ask that the words, "but it might to the bonding company," be stricken from the answer as not responsive, and argumentative.

The COURT: Yes, it isn't responsive. Let it go out.

Mr. BENNETT: Exception."

XXVI.

The Court erred in overruling defendant's Motion to Dismiss, made at the close of all the evidence, as follows: [306]

"Mr. BENNETT: If the Court please, at this time I would like to renew, for the purposes of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined."

XXVII.

The Court erred in holding and deciding that the plaintiff below could recover on the grounds that, if the said bond was not good as a statutory undertaking, it was good as a common law bond.

XXVIII.

The Court erred in deciding that this action could be brought in the name of the State of Montana.

XXIX.

The Court erred in holding and deciding that the defendant intended to insure beans when they used the form containing the word, "grain" in said bond.

XXX.

The Court erred in holding and deciding that the said bond should be reformed and the word, "beans" inserted therein in the place of the word, "grain".

XXXI.

That the evidence is insufficient to support the findings and conclusions of the District Court.

XXXII.

That the Court erred in failing to find that on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company of Mary-

land for a Public Warehouseman's bond to the State of Montana. [307]

XXXIII.

That the Court erred in failing to find that on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain.

XXXIV.

That the Court erred in failing to find that at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana.

XXXV.

That the Court erred in failing to find that said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen.

XXXVI.

That the Court erred in failing to find that neither said bond nor any renewal thereof was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry thereof.

XXXVII.

That the Court erred in failing to find that no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued by the State of Montana, nor any department thereof, to said Chatterton & Son to engage in business as public warehousemen, as provided under the Statutes and laws of said State of Montana, or for any other purpose or at all. [308]

XXXVIII.

That the Court erred in failing to find that said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

XXXIX.

That the Court erred in failing to find that said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof.

XL.

That the Court erred in failing to find that there exists no basis for the plaintiff making claim under said bond.

XLI.

That the Court erred in failing to find that there exists no basis for a reformation of said bond.

XLII.

The Court erred in transferring this cause to the equity side of the docket.

XLIII.

The Court erred in finding that the general allegations of said Plaintiffs' Bill of Complaint were true.

XLIV.

The Court erred in ordering and granting judgment in favor of the plaintiff and against the defendant for the sum of Thirteen Thousand, One Hundred and no/100 Dollars ($13,100.00), with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, when the said bond or undertaking sued on in this action is limited in the penal sum of Ten Thousand and no/100 Dollars ($10,000.00).

WHEREFORE, defendant prays that the said Decree may be reversed, and for such other and

further relief as to the Court may seem just and proper.

Dated this 7th day of December, 1936.

WEIR, CLIFT &
BENNETT,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 8, 1936. [309]

Thereafter, on December 8th, 1936, ORDER ALLOWING APPEAL was duly signed and filed herein, as follows, to wit: [310]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant in the above entitled action, having filed herein its petition that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Decree made, rendered and entered in the above entitled Court and action on the 19th day of September, 1936, and that a citation be issued, as provided by law, and a transcript of the records, proceedings and papers upon which said Order and Judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rulings of said Court in said cases made and provided; and that an Order be made, fixing the amount of the security which the defendant shall give and furnish upon said appeal and

that, upon giving of such security, all future proceedings of this Court be suspended and stayed until the determination of the appeal by the United States Circuit Court of Appeals for the Ninth Circuit;

And the Court being fully advised, and it appearing therefrom [311] to be a proper cause therefor,

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Decree entered and filed herein on the 19th day of September, 1936, as aforesaid, be and the same is hereby allowed; and

IT IS FURTHER ORDERED, that a certified transcript of the record, evidence, Decree and all proceedings in the above entitled action be transmitted by the Clerk of the above entitled Court to said United States Circuit Court of Appeals for the Ninth Circuit;

IT IS FURTHER ORDERED, that the amount of bond on appeal be and hereby is fixed in the sum of Eighteen Thousand Dollars ($18,000.00), which bond may be executed by the defendant, as principal, and by such surety or sureties as shall be approved by this Court and which shall operate upon approval by this Court as a supersedeas bond, and stay of execution is hereby granted pending the determination of such appeal.

Dated this 8th day of December, 1936.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Dec. 8, 1936. [312]

Thereafter, on December 8th, 1936, BOND ON APPEAL was filed herein, as follows, to wit: [313]

[Title of Court and Cause.]

BOND ON APPEAL.

Know All Men By These Presents:

That we, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, as Principal, and AMERICAN BONDING COMPANY OF BALTIMORE, a Maryland corporation, authorized to act as surety under the laws of the State of Montana, as surety, are held and firmly bound unto the State of Montana and the Department of Agriculture, Labor and Industry thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana, in the sum of Eighteen Thousand and no/100 Dollars ($18,000.00) lawful money of the United States, to be paid to said aforementioned plaintiff, its certain attorneys, successors and assigns; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 5th day of December, 1936.

WHEREAS, the above named FIDELITY AND DEPOSIT COMPANY OF [314] MARYLAND, a corporation, has prosecuted or is about to prose-

cute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Decree of the United States District Court for the District of Montana in the above entitled cause, in favor of the plaintiff and against the defendant, in the sum of Thirteen Thousand, One Hundred and no/100 Dollars ($13,100.00) and interest and costs taxed in the sum of One Hundred and Sixty-nine and no/100 Dollars ($169.00);

NOW, THEREFORE, the condition of this obligation is such that if the said above named FIDELITY AND DEPOSIT COMPANY OF MARYLAND shall prosecute its appeal to effect an answer of costs and damages and pay the judgment of the District Court if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

[Seal] By: ABE KALIN
Attorney-in-Fact.

AMERICAN BONDING COMPANY OF BALTIMORE,

[Seal] By: ABE KALIN
Its Attorney-in-Fact.

Attest: .....

The within and foregoing bond is approved, both as to sufficiency and form, and is allowed as an

appeal bond and as a supersedeas bond, this 8th day of December, 1936.

CHARLES N. PRAY,
United States District Judge. [315]

POWER OF ATTORNEY
AMERICAN BONDING COMPANY
OF BALTIMORE
HOME OFFICE: BALTIMORE, MARYLAND.

Know All Men By These Presents:

That the American Bonding Company of Baltimore, a corporation of the State of Maryland, by J. G. Yost Vice-President and T. N. Ferciot, Jr., Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which reads as follows:

"The President, or any of the Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries, and Attorneys-in-Fact, as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto." does hereby nominate, constitute and appoint Abe Kalin, of Helena, Mon-

tana, its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed: any and all bonds and undertakings. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

The said Assistant Secretary does hereby certify that the aforegoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said American Bonding Company of Baltimore, this 30th day of December, A. D. 1935.

AMERICAN BONDING CO.
OF BALTIMORE,
[Seal] By J. G. YOST,
Vice-President.

Attest: T. N. FERCIOT, Jr., Assistant Secretary.

State of Maryland,
City of Baltimore.—ss.

On this 30th day of December, A. D. 1935, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly

commissioned and qualified, came the above-named Vice-President and Assistant Secretary, of the AMERICAN BONDING COMPANY OF BALTIMORE, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(Signature unreadable.)

[Seal] **Notary Public.**

[Endorsed]: Filed Dec. 8, 1936. [316]

Thereafter, on December 8th, 1936, CITATION ON APPEAL was issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [317]

[Title of Court and Cause.]

CITATION.

To the Above Named Plaintiff and to its Attorneys of Record:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal in the above entitled action, of record in the office of the Clerk of the District Court of the United States for the District of Montana, wherein the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, is Appellant and THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSRY THEREOF, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana, is Appellee, to show cause, if any there be, why the Decree and Judgment rendered against the defendant and appellant, as in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties hereto on that basis. [318]

WITNESS the Hon. Charles N. Pray, Judge of the District Court of the United States for the

District of Montana, this 8th day of December, 1936.

CHARLES N. PRAY,
Judge of the District Court of the United States, District of Montana.

Service of the above and foregoing Citation admitted and copy thereof received this 11 day of December, 1936.

R. G. WIGGENHORN,
EVOR K. MATSON
Attorney General.
Attorneys for Plaintiff and Appellee. [319]

[Endorsed]: Filed Dec. 11, 1936. [320]

Thereafter, on December 11th, 1936, Praecipe for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [321]

[Title of Court and Cause.]

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Please prepare and certify Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action and include therein the following papers and documents:

1. Certificate of Clerk of State Court on Removal Proceedings.
2. Notice of Petition and Bond for Removal.

3. Petition for Removal.
4. Removal Bond for Costs.
5. Order of Court on Removal.
6. Original Complaint.
7. Original Answer.
8. Reply.
9. Plaintiff's Motion to File Amended Complaint.
10. Notice of Motion to Amend Complaint.
11. Objections of Defendant to Motion to Amend.
12. Amended Complaint.
13. Decision of Court Allowing filing of Amended Complaint.
14. Defendant's Motion to Dismiss Amended Complaint.
15. Stipulation submitting Motion to Dismiss.
16. Decision of Court on Motion to Dismiss.
17. Bill of Exceptions settled March 14, 1935.
18. Defendant's Answer.
19. Plaintiff's Motion to Strike affirmative defenses contained in Answer. [322]
20. Notice of Motion to Strike.
21. Stipulation submitting Defendant's Motion to Strike.
22. Decision of Court granting Motion to strike.
23. Bill of Exceptions settled January 18, 1936.
24. Stipulation Waiving Trial by Jury.
25. Stipulation Allowing Amendments to Answer.
26. Judgment.

27. Bill of Exceptions settled November 30, 1936.
28. Petition for Appeal.
29. Assignment of Errors.
30. Order Allowing Appeal and fixing Bond.
31. Bond on Appeal.
32. Citation.
33. Clerk's Certificate.
34. This Praecipe.

Dated this 11th day of December, 1936.

WEIR, CLIFT &
BENNETT,
Attorneys for Defendant and Appellant.

Due personal service of within Praecipe made and admitted and receipt of copy acknowledged this 11th day of December, 1936.

E. G. WIGGENHORN
ENOR K. MATSON
Attorney General.
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 11th, 1936. [323]

Thereafter, on December 28th, 1936, an AMENDED PRAECIPE for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [324]

[Title of Court and Cause.]

AMENDED PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

Please prepare and certify Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action and include therein the following papers and documents.

1. Certificate of Clerk of State Court on Removal Proceedings.
2. Notice of Petition and Bond for Removal.
3. Petition for Removal.
4. Removal Bond for Costs.
5. Order of Court on Removal.
6. Original Complaint.
7. Original Answer.
8. Reply.
9. Plaintiff's Motion to File Amended Complaint.
10. Notice of Motion to Amend Complaint.
11. Objections of Defendant to Motion to Amend.
12. Amended Complaint.
13. Decision of Court Allowing filing of Amended Complaint.
14. Defendant's Motion to Dismiss Amended Complaint.
15. Stipulation submitting Motion to Dismiss.

16. Decision of Court on Motion to Dismiss. [325]

17. Bill of Exceptions settled March 14, 1935, except that you will omit therefrom the complaint at pages 2 to 11 inclusive, the Answer, at pages 13 to 24, inclusive, and the Amended Complaint at pages 27 to 34, inclusive of said Bill of Exceptions, for the reason that the same appear elsewhere in said transcript.

18. Defendant's Answer.

19. Plaintiff's Motion to Strike affirmative defenses contained in Answer.

20. Notice of Motion to Strike.

21. Stipulation submitting Defendant's Motion to Strike.

22. Decision of Court granting Motion to Strike.

23. Bill of Exceptions settled January 18, 1936.

24. Stipulation Waiving Trial by Jury.

25. Stipulation Allowing Amendments to Answer.

26. Decision of Court.

27. Judgment.

28. Bill of Exceptions settled November 30, 1936.

29. Petition for Appeal.

30. Assignment of Errors.

31. Order Allowing Appeal and Fixing Bond.

32. Bond on Appeal.

33. Citation.

34. Clerk's Certificate.

35. This Praecipe.

Dated this 24th day of December, 1936.

WEIR, CLIFT &
BENNETT
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Dec. 28, 1936. [326]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes, consisting of 326 pages, numbered consecutively from 1 to 326 inclusive, constitute a full, true and correct transcript of all portions of the record and proceedings called for by praecipe and required to be incorporated in the record on Appeal in case Number 917, The State of Montana, ex rel Chatterton & Son, Plaintiffs, versus Fidelity and Deposit Company of Maryland, Defendant, as appears from the original records and files of said court in my custody as such Clerk;

And I do further certify and return that I have annexed to said Transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said Transcript of Record amount to the sum of $63.85, and have been paid by the appellant.

WITNESS my hand and the seal of said court at Great Falls, Montana, this 28 day of December, A. D. 1936.

[Seal] C. R. GARLOW,
Clerk. [327]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 8428.

FIDELITY AND DEPOSIT COMPANY, OF MARYLAND, a corporation,

Appellant,

vs.

THE STATE OF MONTANA and the DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY thereof, for the use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings, Montana,

Appellees.

STIPULATION FOR DIMINUTION OF RECORD.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action that in the printing of the Transcript

of the record herein the title of the Court and the title of the cause on the pleadings and documents need not be printed in full, but may be entitled thus, "Title of Court and Cause", and that the endorsement on each of said papers and documents, except the filing endorsement, may also be admitted.

IT IS FURTHER STIPULATED AND AGREED that in the printing of said Transcript no pleading or other document need be duplicated, and where said pleading or document is already in said printed Transcript, if the same thereafter appears in said Transcript it may be incorporated by reference to the prior page in said Transcript where same is already set forth.

Dated this 28th day of December, 1936.

WEIR, CLIFT &
BENNETT
Attorneys for Appellant.

R. G. WIGGENHORN,
Attorneys for Appellee.

SO ORDERED:

CURTIS D. WILBUR
Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 31, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8428. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Deposit Company of Maryland, a corporation, Appellant, vs. The State of Montana and The Department of Agriculture, Labor and Industry Thereof, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton and Son, a corporation, at Billings, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed December 31, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8428

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Fidelity and Deposit Company of Maryland, a corporation,

Appellant,

vs.

The State of Montana and The Department of Agriculture, Labor and Industry thereof, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

HARRISON J. FREEBOURN, Helena, Mont.
Attorney General of the State of Montana.
ENOR K. MATSON, Helena, Mont.
Assistant Attorney General.
R. G. WIGGENHORN, Billings, Mont.
Attorneys for Appellees.

Filed ....., 1937.

.....Clerk.

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont'd)

TABLE OF CASES (Cont'd)

TEXTBOOKS

TABLE OF CASES (Cont'd)

STATUTES

TABLE OF CASES (Cont'd)

United States
Circuit Court of Appeals
For the Ninth District

Fidelity and Deposit Company of Maryland, a corporation,

Appellant,

vs.

The State of Montana and The Department of Agriculture, Labor and Industry thereof, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The following facts are stated only in amplification of the Statement appearing in appellant's brief and as they may controvert the facts stated in appellant's brief.

At the time of and immediately before the matters here in controversy, Chatterton & Son operated warehouses in Michigan, Ohio, Missoura and at Billings, Montana. The principal business was the bean business, buying, selling and storage (Tr. 188). Seventy-five per cent of their business was beans and the grain business was only a small portion thereof. They were referred to as the largest bean jobbers in the United States (Tr. 198). They would handle fifteen car loads of beans to one car

of grain (Tr. 199). They did not deal in grain except in the State of Michigan (Tr. 203). All of their western business consisted exclusively of beans (Tr. 190). The warehouse at Billings was engaged *exclusively* in the bean business (Tr. 190), and as well for the Kansas City terminal warehouse (Tr. 189 and 128).

The agent for the Fidelity and Deposit Co. who wrote the bond in question was an intimate friend of all the chief officers of Chatterson & Son, having close social and business contacts with them (Tr. 190-191). *He knew that the western business of Chatterton & Son, including Billings, was exclusively the bean business* (Tr. 192).

The bond in question was not given to qualify Chatterton & Son under the laws of the State of Montana to do business as a licensed public warehouseman, as stated in appellant's Statement of Case. It was obtained by Mr. Healow, the manager of the Billings warehouse, "for the protection of the growers" (Tr. 131, 157). When the bond was procured, and as well when the renewal certificate was issued, Mr. Healow did not know that it was necessary to have a license from the State, but figured that they should be bonded as a protection to the growers (Tr. 144). In his prvious eight years experience as manager of another bean warehouse (Tr. 128), he had operated under a bond (Tr. 131, 141).

It is not strictly correct to say that the original bond covered the period from January 1, 1930 to July 1, 1930, as stated in appellant's Statement of Case. The only reference to that period of time appearing in the bond (Tr. 13-14) is in the "whereas" clause, wherein it is recited that Chatterton & Son had applied

to the Department of Agriculture for a license to carry on the business of a public warehouseman for that stated period.

In any event, it is likewise not a correct statement to say that the bond was not delivered to the Department of Agriculture until after its term had expired, as appears in appellant's Statement of Case, if it may be considered that the renewal certificate continued the life of the bond. By that renewal certificate the bond was coninued in effect until the 1st day of July, 1931 (Tr. 16), while the bond was transmitted to the Commissioner of Agriculture on May 12, 1931, by Mr. Healow.

The judgment was not for $13,100.00, with interest from July 15, 1931, as stated in the appellant's Statement of Case, but was in said sum "with interest upon said sum from the date hereof" (September 19, 1936). A reference to the judgment (Tr. 125-126) will show that appellant has misconstrued the language thereof, it appearing therein that said stated sum is "the amount of said bond with interest thereon at the rate of six per cent per annum from July 15, 1931,". In other words $10,000.00 with interest from July 15, 1931 to date of judgment. The judgment then carries six per cent interest as provided by Montana statute, from its date.

With respect to delivery of the bond, the agent for the appellant mailed it out of his office on January 15, 1930, to Mr. Healow at Billings. The continuation certificate was forwarded by the agent to the Secretary of Agriculture at Helena, so he says, apparently about July 1, 1930 (Tr. 167). It appears that Mr. Healow received the bond but did not notice that it covered "grain" and not "beans" (Tr. 135). Apparently Mr. Healow

kept the bond, thinking that it had been filed, and transmitted it on to the Commissioner of Agriculture when he discovered it (Tr. 136). The continuation certificate apparently was forwarded by the agent for the bonding company to "Secretary of Agriculture at Billings" (Tr. 164) and received instead by Mr. Healow, but apparently forgotten by him and afterwards found in his files (Tr. 136). It appears that in May, 1931, for the first time, the Commissioner of Agriculture raised the question as to whether a bean warehouse should not file a bond with him and this brought about the inquiry by Chatterton & Son as to where the bond had been mislaid, resulting eventually in its discovery (See history of transaction as disclosed by correspondence appearing in Plaintiff's Exhibits 6 to 17 incl. Tr. 151-177).

In one of these letters the agent for the bonding company acknowledges that the bond had been in force since January 7, 1930 (Tr. 165). In a letter written in May 1931, he transmits a copy of the renewal certificate, in lieu of the original which at that time had not yet been found, and in said letter acknowledges again that bond was in force by renewal (Tr. 171). On December 6, 1930, over the corporate seal of the bonding company and the signature of its attorney in fact the company acknowledges that it is surety upon the bond in dispute, and confirms the bond as effective (Plaintiff's Exhibit 1, Tr. 179).

Mr. Healow, as the manager of the warehouse, from the beginning of storage, offered the bond as an inducement to growers to store their beans in the warehouse. He represented to persons offering beans for storage and always maintained that the warehouse was bonded. He communicated it generally to the growers in the territory (Tr. 134, 155, 183, 184, 185, 186). Such rep-

resentations induced growers to put their beans in the warehouse (Tr. 183, 184, 185, 186).

During the fall and winter of 1930 and continuing through the winter into 1931, 39,897 sacks of beans of 100 pounds each were stored, in the aggregate, by about 130 individual bean growers, and a warehouse receipt issued to each grower by Chatterton & Son (Tr. 137, 226 and Ex. 18 at Tr. 19). The form of warehouse receipt issued was for a lot of beans specifically described and called for return to the holder in accordance with the laws of the State (Ex. 4, Tr. 129). That law will be discussed in the brief. It is the common practice in all bean warehouses and generally understood in the trade that beans taken for storage shall be kept segregated and their identity preserved (Tr. 129-130).

That in this instance, the identity of the beans in this warehouse was not preserved and they were commingled and, from the beginning, the beans were treated by Chatterton & Son as their own, were from time to time shipped from the warehouse and out of the State, and sold and disposed of. The conduct of said Chatterton & Son in handling said beans indicates that they were all converted to the use of Chatterton & Son during the term of the bond. Prior to July 1, 1931, all but 12,000 sacks of the beans had been shipped out of the State by Chatterton & Son to their Kansas City warehouse and there sold and disposed of. The remaining 12,000 sacks were shipped by Chatterton & Son between July 1st and July 13, 1931, to their Kansas City warehouse, and there not only commingled and their identity lost with respect to individual ownership, but they were likewise hypothecated for a loan and converted. The conduct of Chatter-

ton & Son throughout indicates clearly that from the beginning they breached their obligation as a bailee and warehouseman and treated the beans, and all of them, as their own, and ignored the rights of the owners respectively (See generally the testimony of Healow, Tr. 127-147, Harris Tr. 216-225 and Lindsay, Tr. 226-237).

Treating the beans as converted respectively on the dates of shipment out of the State, and considering the value as of the dates of conversion respectively, the aggregate value of all of said beans so converted was the sum of $65,843.57, after crediting all advances made against the same by Chatterton & Son (Tr. 229 and Plf. Ex. 18 at Tr. 19). Treating the conversion as having taken place at the time the warehouse was closed in July 1931, the value of the beans at that time, after crediting all advances, was $37,260.76 (Tr. 233-235).

The agent for the bonding company admitted that when the bond was written he understood that various commodities were to be stored therein, and that, in writing the bond, it was of no interest to him whether beans or grain were to be stored in the warehouse and it would make no difference to him (Tr. 249).

ARGUMENT
(Summary of Argument)

A. The Court Did Not Err In Permitting Complaint To Be Amended.

1. *Amendments Constitute No Material Departure.*
2. *Generally Amendments Are Favored and Should Be Liberally Allowed.*
3. *Action Not Barred By Any Statute of Limitations.*

B. Complaint and Supporting Proof Amply Sustain Recovery.

1. *Bond Is Enforcible In Accordance With Its Terms and Intent, As On a Common Law Bond.*
2. *The Failure to File the Bond or Procure a License is Immaterial and Cannot Defeat Recovery.*
3. *The Intent of the Parties Under the Bond Was to Protect The Storage of Beans and, If Necessary, the Bond Should Be Reformed Accordingly.*
4. *Chatterton & Con Is Not an Indispensable Party.*
5. *The Action is Properly Brought in the Name of the State of Montana Under the Terms of the Bond.*
6. *The Evidence Establishes Breach of the Conditions of the Bond and Loss and Damages Exceeding the Penalty Thereof.*

A. The Court Did Not Err In Permitting Complaint To Be Amended.

1. *Amendments Constitute No Material Departure.*

Without justification for it, with no reference to the pleadings whatsoever, appellant's brief proceeds upon the theory and assumption that the bond here sued upon was issued under the authority of Section 3589 of the Revised Codes of Montana, or some other statute, and that the action was originally brought under such statute. That statute is referred to in the brief as the Montana Warehouse Statute. This is the statute that concerns the storage of grain. It has not the slightest application here and is wholly foreign to any of the matters at issue. There

is nothing in either the original or amended complaint that ties into the statutes dealing with the storage of grain. Let it be understood at the outset that appellees do not now and never have placed any reliance upon or have in any way been concerned with those statutes.

Nor was the original complaint or the amended complaint brought upon or based upon any other statute. The reference to any of these statutes in this connection can be designed only to confuse, or to specially suit the purposes and argument of appellant. They are a red herring across the trail.

Whatever may be said in criticism of the original complaint, whether or not it be a model form of pleading, a search thereof will not disclose the slightest reference to any statute nor the right to conclude that it was based upon or relied upon the authority of any statute. It states that Chatterton & Son was operating a public warehouse for storing beans (Par. 1, Tr. 3); that defendant was fully informed thereof and executed the bond in consideration thereof (Par. 5, Tr. 5); and that Chatterton & Son held itself out to the growers of beans and represented that its warehouse was duly bonded (Par. 10, Tr. 6-7). These are all proper allegations for supporting recovery as on a common law bond.

It is true that the complaint states more in this connection. Reference is made to the Commissioner of Agriculture that the bond was filed with him, that a further consideration for the bond was to qualify Chatterton & Son to conduct a warehouse, and that upon breach of the bond the Department of Agriculture demanded payment of the bond.

None of these allegations, however, warrant the cataloging

of the complaint as one based upon any special statute and no one has the right to say that it is based upon any special statute or needs a special statute to support it. At best it might have been claimed that the complaint was demurrable for uncertainty. In truth, it contains allegations which could not be proved and which the actual proof did not support in all respects, which in itself explains, in part, the amendments. However that may be, it is suggested that even without amendments the complaint would have stood the test upon the trial, under the proof as offered, and would have survived an attack upon the ground of fatal variance.

Reference is made by appellant to the Agricultural Seeds Act, Sections 3592.1 to 3592.9, Revised Codes of Montana. We make no claim that commercial beans, as distinguished from seed beans, are within the contemplation of the act. Clearly the act does not include commercial beans generally. However that may be, neither the original complaint nor the amended complaint is grounded upon that act. Whatever doubt there may have been from the allegations as they appeared in the original complaint, however confusing the theory of the pleader may have been (if these allegations may be said to be confusing), it may not be said that the original complaint was grounded upon any statute or that it depended for its substance upon any statute. Certainly the amended complaint left no doubt and in undisguisable terms pleaded facts sustaining recovery as upon a common law bond.

The reference in appellant's brief to the Act passed by the Montana Legislature in 1933, after this bond was written and all of the events alleged in the complaint had transpired, being an Act dealing with and regulating bean warehouses exclusively,

is entirely irrelevant. Equally irrelevant is the statement that the writer of this brief drafted that Act; a statement which is neither affirmed nor denied.

The argument, then, that there is here found a change from law to law is wholly unsupported. In fact, except for the allegations of mistake supporting reformation, in their essentials the two complaints are substantially the same, or at least contain substantially the same fundamental allegations. This can be demonstrated by laying the two complaints side by side. We find the following basic allegations found in each complaint:

1. Chatterton & Son were operating a warehouse for the storage of beans.

(Paragraph 1 of the original complaint)

(Paragraphs II and III of amended complaint, with more elaborate statements showing that beans alone and not grain were stored)

2. The bond was executed by defendant to indemnify the owners of beans stored in the warehouse.

(Paragraph 3 of original complaint)

(Paragraph IV of amended complaint)

3. Purpose of bond was to cover a bean warehouse.

(Paragraph 5 of original complaint, with the additional allegation that the bond was issued likewise to qualify Chatterton & Son to conduct such warehouse in the State of Montana)

(Paragraphs V and VI of amended complaint showing in greater detail the persuasive facts indicating the true intent and purpose and that the word "grain" was used instead of "beans" by mistake)

4. Chatterton & Son represented itself as bonded warehouse for storage of beans and the beans were stored on the faith thereof.

(Paragraph 10 of original complaint, with the additional allegation that Chatterton & Son also represented itself as licensed)

(Paragraphs VIII and XI of amended complaint, with additional allegations appearing in paragraph XII showing that holders of storage tickets relied upon bond and were ignorant of the mistake appearing therein)

5. Breach of the conditions.

(Paragraph 11 of original complaint)

(Paragraph XIV of amended complaint)

The prayer for relief in both instances is the same, except for the additional prayer for reformation found in the amended complaint.

2. Generally Amendments Are Favored and Should Be Liberally Allowed.

As governing amendments of pleadings generally, Rule 18 of the United States District Court for the District of Montana reads as follows:

> "Amendments of pleadings both in actions at law and suits in equity, except so far as otherwise provided for by act of Congress, or the Equity Rules, or by these rules, shall be governed by the laws of the State, as the the same shall exist at the time the application to amend is passed upon, which laws are, to the extent mentioned, hereby adopted as rules of this Court, both at law and in equity. - - - - ".

Section 9187 of the Revised Codes of Montana covers the subject and, so far as applicable, provides as follows:

> "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the same of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer, reply, or demurrer. *The court may likewise, in its discretion, after notice to or in the presence of the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars;* - - - - "

A search of the Montana cases interpreting this statute will disclose no case where the Supreme Court of Montana has ever reversed the lower court for granting an amendment, although it has been reversed for refusal to do so.

State v. District Court, 99 Mont. 33, 43 P (2d) 249.

On the contrary, the Montana Supreme Court has uniformly sustained a liberal interpretation of the statute and, in conformity with the general rule, has held that a motion to amend is addressed to the sound judicial discretion of the trial court, and that the rule is to allow and the exception to deny amendments. The cases include amendments granted at all stages of the proceedings, including at the eve of trial, during the trial, and at the close of the evidence.

Sandeen v. Russell Lumber Co., 45 Mont. 273, 122 Pac. 913.

Cullen v. Western Mortgage & Warranty Co., 47 Mont. 513, 134 Pac. 302.

De Celles v. Casey, 48 Mont. 568, 573, 139 Pac. 586.

Fowlis v. Heinecke, 87 Mont. 117, 120, 287 Pac. 169.

Besse v. McHenry, 89 Mont. 520, 525, 300 Pac. 199.

Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 41 Pac. (2d) 44.

Buhler v. Loftus, 53 Mont. 546, 559, 165 Pac. 601.

Clack v. Clack, et al., 98 Mont. 552, 41 Pac. (2d) 32.

Berthelote et al. v. Loy Oil Co. et al., 95 Mont. 434, 456, 28 Pac. (2d) 187.

In fact an amendment was upheld by the Supreme Court where the same was not offered until the jury had been sworn and notwithstanding that the amendment changed the issues entirely.

Apple v. Seaver, 70 Mont. 65, 223 Pac. 830.

Reference is also made to the general principles applying to amendments as stated in *Bancroft's Code Pleading,* Vol. 1, pp. 736-771. I quote from page 736:

> "Experience shows that in the attainment of justice by resort to judicial tribunals, amendments to pleadings are of ever recurring necessity; and the tendency of judicial decision should be, and is, towards liberality in permitting, in furtherance of justice, such amendments as facilitate the production of all the facts bearing upon the questions involved. The codes and the courts alike favor a broad liberality, rather than severely technical tendencies on this subject. Hence it is a rule generally that, in the furtherance of justice, amendments to pleadings should be liberally allowed;"

We quote from page 738:

> "A court may, however, refuse leave to amend where there is inexcusable delay in applying for permission, where it is obvious that an amendment could not be of

any avail in stating a cause of action or defense as the case may be; where the desired amendments are clearly not material to the original case, where great inconvenience or an injustic to the adverse party must necessarily result therefrom, or where the amendment occasions surprise, or places opposing counsel at a disadvantage, unless these objections, as generally may be done, are obviated by granting a continuance, or by the imposition of such terms as the circumstances may justify."

If the delay in this case was inexcusable, that was for the trial court to say and a matter for its discretion.

We quote also from page 742:

"Ordinarily a party should be permitted to amend so as to present for determination his legal rights, to express the cause of action originally intended; or to rectify a mistake. A court is rarely justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues or properly presented by the pleading."

We quote from page 755:

"There is considerable conflict among the authorities as to the rules governing amendments in which new or independent causes of action or grounds of defense are introduced. The rule generally given is that amendments may be allowed to any extent, provided they do not substantially change the cause of action or introduce a new cause of action."

And from page 757:

"All that can be required is, that a wholly new cause of action which is entirely foreign to the original cause of action, shall not be introduced, and that the plaintiff

> cannot be allowed to strike out the entire substance and prayer of his complaint, and insert a new cause by way of amendment.
>
> The reason for the rule prohibiting a change of a cause of action by amendment of the complaint is that a defendant may not be summoned to answer one cause of action and be required, on his appearance, to answer to another. But where the summons requires the defendant to answer the identical clause of action set forth in the amended complaint, the rule cannot apply, for in such case the defendant is neither misled nor surprised."

In many jurisdictions amendments are allowed before trial although they introduce an entirely new cause of action (Page 760).

We quote from *Rae v. Chicago, Milwaukee & St. Paul Railway Co., (N. D.,* 107 N. W. 197:

> "The object of statutes of this character is to facilitate and insure a full, fair, and speedy determination of the actual claim or defense on the merits by requiring the court to permit the pleadings to be amended if for any reason they do not fully and fairly present all the facts essential to the real merits of the claim or defense. It is clear, therefore, that an amendment of the complaint is not objectionable merely because it introduces a new or different cause of action in the technical meaning of that term."

With particular reference to the facts in this case, reference is made to *Sec. 274a of the Judicial Code* (28 U. S. C. A. 387), relaxing the ancient rules governing the distinction between law and equity, from which we quote:

> "In case any United States court shall find that a suit at law should have been brought in equity or a suit in

> equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

Equity Rule 23 provides as follows:

> "If in a suit in equity a matter ordinarily determinable at law arises such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

The section of the Judicial Code above quoted has been liberally construed to show the intention to abolish tchnicalities and form and prevent a suit from becoming a game of skill; to obtain a speedy trial and conclusion of the issues, the paramount idea being that courts are established and maintained for the administration of justice rather than for an exhibition of technical skill.

7 Hughes Federal Practice 4443. 23 R. C. L. 357.

In *Liberty Oil Co. v. Condon Nat. Bank,* 260 U. S. 235, 43 Sup. Ct. Rep., where an equitable defense was raised in an action at law, the court said:

> "Under equity rule No. 22 a suit in equity which should have been brought at law must be transferred to the law side of the court. There is no corresponding provision in rule or statute which expressly directs this to be done when the action begun at law should have been

> by a bill on the equity side, but we think the power of the trial court to order a transfer in a case like this is implied from the broad language of Section 274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill of equity, and from Section 274a of the Judicial Code, quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice. - - - To be sure, these sections do not create one form of civil action as do the Codes of Procedure in the states, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps towards Code practice."

See also *6 Hughes Federal Practice 3843* to the effect that a party to a suit has the right at any stage of the cause to amend his pleading so as to obviate the objection that his suit was not brought on the right side of the court.

With respect to reformation, under the general practice of courts of equity to give complete relief on all matters before them, it is the uniform rule that the party who seeks reformation in a court of equity may in the same court obtain the enforcement of the instrument as reformed, as at law, including money damages.

23 R. C. L. 357.

Thus it appears clearly that the technical objections attempted to be raised by appellant have no place in modern procedure. Even though the case be brought on the wrong side of the court, the court will quickly remedy that situation without penalty.

In any event, the question of the right to a trial by jury should not be involved here, because a jury was expressly waived in writing (Tr. 112).

3. Action Not Barred By Any Statute of Limitations.

What has been said above should dispose of any question of limitation of the action, without more, since the amended complaint does not present a new cause of action. The statutes referred to in appellant's brief do not fit this case, in any event. Section 9033, relating to an action on the ground of mistake, might appear to apply to an action for reformation. However this is not an action for reformation, but is still the same old action to recover on the bond, and reformation is only an incident thereof. As will be pointed out hereafter, and as was held by the trial court, reformation was unnecessary to enforce the bond and to give judgment for appellees.

Appellant's whole argument as relating to the statute of limitations, is predicated upon the assumption that the amended complaint states an entirely new and different cause of action and that that cause of action is for reformation. Thus, appellant's brief relies upon four tests indicated in 37 C. J. 1076. This citation is to the subject of Limitations of Actions as that subject is treated in Corpus Juris. The tests referred to are applied only for the purpose of determining whether there is a new cause of action such that it may be barred by the statute of limitations. Thus, quoting further from Corpus Juris on the following page (1077) the following appears:

> "In most of the adjudicated cases holding that the action was in fact commenced when he amendment was made

> and not when the action itself was commenced, the departure between the first and amended pleadings is said to be a change from law to law, and commonly arises where a cause of action under the common law is first asserted and after the period of limitation has expired a statutory action is relied upon;"

It can hardly be seriously urged that under these tests or otherwise the amended complaint states a new or different cause of action. With respect to the statute of limitations, or otherwise, the action is still upon the bond. The nature of a cause of action is to be determined from the object and purpose of the suit. If reformation be necessary before a contract can be enforced, since that does not require an independent action and full relief can be granted in one action under our practice, the reformation is a mere incident to the real object and purpose of the suit.

Union Ice Co. v. Doyle, (Cal.) 92 Pac. 112.

Banks v. Stockton, (Cal.) 87 Pac. 83

Murphy v. Crowley, (Cal.) 73 Pac. 820

Gardner v. California Guaranty Inv. Co., (Cal.) 69 Pac. 844

Oakland v. Carpentier, 13 Cal. 643

Goodnow v. Parker, (Cal.) 44 Pac. 738

Clausen v. Meister, (Cal.) 29 Pac. 232

The same courts hold that the statute of limitations applicable is the limitation applying to an action upon a contract. Thus this case is not an "action for relief on the ground of fraud or mistake," governed by a two year limitation. In fact the matter of the statute of limitations is in no way involved in this case.

Nor is the citation from Volume 7, Cyclopedia of Federal Procedure, Section 3538, cited at page 26 of appellant's brief, any authority to the contrary. As will be noted from the quotation, it is where the *recovery* upon a note is barred, that the statute may be availed of. That means the cause of action upon the note, not for the equitable relief of reformation. And so in the case of *Bank of U. S. v. Daniel,* 12 Pet. 32, 9 L. Ed. 989, cited at this point in the brief, the statute held applicable was the one applying to the cause for the recovery of money and not for reformation.

If this cause of action were held to have been changed so as to now make it one for reformation, then, under the Federal Conformity Act (28 U. S. C. A. 724) excepting equity and admiralty causes from conformity with state practice, the Montana statutes of limitations would have no application here.

25 C. J. 849-851

21 C. J. 251-257

One other matter dealt with in appellant's brief under this head should be cleared up. It is there argued that in the amended complaint it is alleged that Chatterton & Son never qualified to do business in the State of Montana, which appellant construes to mean that the company never qualified as a warehouseman. This, of course, is not the meaning and not the statement. It refers, of course, to the failure of Chatterton & Son, as a foreign corporation, to file its articles of incorporation with the Secretary of State and otherwise conform to the requirements of Section 6651 of the Revised Codes of Monana, to entitle it to do business in the State generally. Thus the corporation "qualifies" under the state laws to do business as a cor-

poration, and that is what is stated in paragraph II of the amended complaint.

Likewise the use of the term "public warehouse" and "public warehouseman" does not give appellant's counsel the right to conclude that a grain warehouse is intended. The statute quoted in the brief defining the terms is a part of the Grain Warehousing Act and, of course, the definition is given only for the purposes of the Act and to indicate what is meant when the term is used elsewhere in the Act. Otherwise a public warehouse is still a public warehouse in Montana, and that applies whether the term appears in the pleadings, in the application for the bond or the bond itself.

B. Complaint and Supporting Proof Amply Sustain Recovery.

1. *Bond Is Enforcible in Accordance With Its Terms and Intent, As On a Common Law Bond.*

With respect to defendant's motion to dismiss complaint, plaintiffs' motion to strike affirmative matter from answer, and plaintiffs' right to recover generally under the pleading and proof, the same questions of law are involved. They will therefore not be treated separately.

There can be and there is no argument of the defalcation of Chatterton & Son and its liability for the conversion of said beans. Its liability far exceeds the penalty of said bond. There can be no question that this bond was procured and was written to protect against that very liability.

The bond names as obligee and runs to the State of Montana

"for the benefit of all parties concerned." The bond is conditioned that "Chatterton & Son shall indemnify the owners of grain stored in said warehouse against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture."

The warehouse, of course, was operated for the storage of beans alone and that was the sole business of Chatterton & Son at Billings. Nothing else had ever been stored there and it was not intended to store anything else there, and the bond was a nullity if it did not indemnify the owners of beans.

For present purposes, we are in no way concerned with the question as to whether the statutes provided for the regulation of the bean warehousing business or prescribed a license and required a bond. The cause of action here, as the complaint is framed, is for recovery upon the common law liability under the bond. That is to say the plaintiffs seek to recover upon the plain implication and force of the bond and the language there used, as under the common law, without respect to any statute which may or may not require such a bond. Furthermore, the theory of the complaint and supporting proof is that the bond was procured, not to comply with any statute nor for the purpose of obtaining a license under a statute, but in order to afford protection to the depositors of beans and to serve as an inducement to prospective depositors to store their beans with safety and security.

The bond here must be distinguished from a bond signed by personal, individual sureties. The rules governing corporate sureties are now clearly differentiated by the courts. Surety

bonds, written by a corporate surety, for compensation in the form of a premium, are no longer governed by the rules of suretyship. Such corporate sureties are not favorites of the law, as are voluntary sureties. Their contracts are construed most strongly against them and in favor of the indemnity which the obligee has reasonable grounds to expect. This new, more modern rule, has now become so firmly established and recognized that citation of authority seems hardly necessary. Reference is here made to the exhaustive annotation upon the subject appearing in 12 A. L. R. 382 and again in 94 A. L. R. 876. We quote from a few of the cases only:

> "The universal rule is that in construing the bond of a surety company, acting for compensation, the contract is construed most strongly against the surety, and in favor of the indemnity which the obligee has reasonable grounds to expect. Such contracts are generally regarded as contracts of insurance, and are construed most strictly against the surety."
>
> *Montana Auto Finance Corp. v. Federal Surety Co.* 85 Mont. 149, 278 Pac. 116.
>
> *State v. American Surety Co.,* 78 Mont. 504, 255 Pac. 1063.
>
> "Unlike an ordinary private surety, a surety of the character here involved which accepts money consideration has the power to and does fix the amount of its premium so as to cover financial responsibility. This class of suretyships, therefore, is not regarded as a 'favorite of the law.' Bryant v. Amer. Bonding Co. 77 Ohio St. 90, 99, 82 N. E. 960, 961. And if the terms of the surety contract are susceptible of two constructions, that one should be adopted, if consistent with the purpose

to be accomplished, which is most favorable to the beneficiary."

Royal Indemnity Co. v. Northern Ohio Granite & Stone Co., (Ohio) 126 N. E. 405.

"The very reason for the existence of this kind of corporation ,and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute."

Atlantic Trust & D. Co. v. Laurinburg, 163 Fed. 690, 695.

"The deep solicitude of the law for the welfare of voluntary parties who bound themselves from purely disinterested motives never comprehended the protection of pecuniary enterprises organized for the express purpose of engaging in the business of suretyship for profit. To allow such companies to collect and retain premiums for their services, graded according to the nature and extent of the risk, and then to repudiate their obligations on slight pretexts, that have no relation to the risk, would be most unjust and immoral, and would be a perversion of the wise and just rules designed for the protection of voluntary sureties. The contracts of surety companies are contracts of indemnity, applicable to contracts of insurance."

Rule v. Anderson (Mo.) 142 S. W. 358, 362.

"The rule is well settled in this circuit that a compensated surety is in effect an insurer, that its contract will be construed as an insurance contract most strongly in favor of the party or parties protected thereby, that forfeiture on technical grounds will not be favored, and that the strictissimi juris rule of the law of suretyship will not be applied for its protection."

Maryland Casualty Co. v. Fowler, 31 F. (2d) 881.

"Paid sureties understand that they are not regarded as considerately or sympathetically as were the gratuitous sureties of the common law, but they are left in doubt as to the extent to which that consideration is withdrawn. The number of cases coming to the courts, in which paid sureties are urging their complete discharge by reason of some infraction of the contract on the part of the indemnified, suggests that a more specific rule concerning their rights and liabilities be stated. It is believed that rule will be easy to discover, if such contracts be consistently treated (as they have often been declared to be) as insurance contracts, rather than the common-law surety contracts. It is true that such contracts retain the form of surety contracts. But the principles governing the liability of sureties did not spring from the form of the contract, but rather from the relations of the parties to such contracts; and a striking change in that relation exists where the obligation of the surety, once gratuitously assumed, is now assumed as a source of profit. While the contract between the parties should govern their rights and liabilities, such contract should no longer be construed strictly in favor of the surety. This has often been declared. It would seem, too, that not every circumstance prejudicial to the interests of the surety should work a total discharge of

the surety, without any reference or consideration to the extent to which the interests of the surety were in fact prejudiced by such circumstance. - - - "

Maryland Casualty Co. v. Eagle River Union Free High School Dist. (Wis.) 205 N. W. 926, 928.

"And in general, as the contracts of surety companies are essentially contracts of indemnity, the courts ordinarily apply to them by analogy the rules of construction applicable to contracts of insurance. Hence, in an action on a bond written by a surety company, if the bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that which is most favorable to the insured will be adopted."

Title & T. Co. v. United States Fidelity & G. Co. (Or.), 1 Pac. (2d) 1100, 1103.

See also:

Murray City v. Banks (Utah), 219 Pac. 246.

Lassetter v. Becker (Ariz.), 224 Pac. 810.

Viewing the bond as thus in the nature of an insurance contract, Chatterton & Son was merely a perfunctory signer. There was no need for that company to sign the bond. The liability of Chatterton & Son to the bean growers was grounded upon its common law liability as a warehouseman and bailee. It grew out of the relationship of the parties. Thus the appellant became the insurer and the bean growers the insured, Chatterton & Son being merely the person who supplied the premium for the insurance. The inducement to Chatterton & Son was the hope thereby to draw customers. Under this view, there would certainly appear to be no good reason why Chatterton & Son should be a party to the action.

It is argued that the bond was not delivered, and therefore

did not become effective. After being executed by Chatterton & Son and the bonding company, it was promptly mailed to the manager of the warehouse at Billings (Tr. 167). The manager (Mr. Healow), from the beginning, published to his prospective customers and advertised the fact that he had the bond and that the warehouse was bonded and offered the bond as an inducement to growers to store their beans in the warehouse (Tr. 134, 155, 183, 184, 185, 186). The growers relied upon such representation (Tr. 183, 184, 185, 186). Six months later, notwithstanding that the bond had not been filed, appellant issued its continuation certificate continuing the bond in force for another year and forwarded the same to the "Secretary of Agriculture" at Billings promptly (Tr. 167). However the continuation certificate was received by Healow at Billings and kept by him (Tr. 136). By thus issuing and transmitting the continuation certificate, notwithstanding that a license had not been issued upon the original bond, the appellant recognized and acknowledged the bond to be effective. On December 6, 1930, over the corporate seal of appellant, appellant expressly acknowledged that the bond was effective and outstanding and confirmed the same (Plf. Ex. 1, Tr. 179). In subsequent letters appellant, through its agent, likewise acknowledged the bond to be effective and outstanding and, when informed that the continuation certificate had become lost, supplied a copy thereof and transmitted it to the Commissioner of Agriculture (Tr. 171). Under the law, there is here abundant proof that the bond was delivered and effective. Certainly appellant is estopped from denying the same.

"Except where there is a statutory provision or order

> of court designating the mode of delivery, there is no precise or set form in which the delivery of a bond must be made; it is sufficient if it is made by any acts or words which show an intention on the part of the obligor to perfect the instrument and to make it at once the property of the obligee; and this may be accomplished, although the bond does not come into the actual possession of the obligee. The strict rules relating to delivery of deeds do not apply to bonds."
>
> 9 C. J. 17.

Even as to written and formal contracts generally, the question of delivery is a question of intention, requiring only an actual relinquishment of the custody or control of the instrument, and in most jurisdictions "the only thing essential to delivery is some manifestation by word or act on the part of the obligor that the instrument is to be immediately binding."

I Williston on Contracts, Sec. 211.

The rule is stated in the Restatement of the Law of Contracts, Sec. 102, as follows:

> "A promise under seal is delivered unconditionally when the promisor puts it out of his possession with the apparent intent to create immediately a contract under seal, unless the promisee then knows that the consignor has not such actual intent."

The bond is conditioned that "Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relation to the business of Public Warehouseman,".

It contains no provision or condition that a license be issued. That appellant intended to bind itself to underwrite and stand back of Chatterton & Son as such warehouseman to fulfill its duties and obligations as such warehouseman, cannot be doubted. The contract is plain. Appellant now merely seeks to evade and to avoid its responsibilities and clear contract obligations. The attempt to avoid is not based upon reason or the claim that the intent to bind itself is not present, but upon the purely technical ground that the law exacted of the principal, Chatterton & Son, that the bond be filed, and that it never was filed. Nowhere in appellant's brief is there any suggestion that a valid and effective bond cannot be given for a warehouseman, to guarantee performance of his duties, without any law providing for the bonding of warehouses and without any repository provided for by law. No reason or authority is cited to question the force of any such bond.

Furthermore, while the State of Montana is named as the nominal obligee the true beneficiaries named in the bond are the depositors of beans, as the "parties concerned." In fact they are expressly referred to in the condition clause of the bond as "the owners of grain stored in said warehouses." (Tr. 14).

> "A statutory bond may be good as a common-law obligation, although insufficient under the statute because of noncompliance with its requirements, provided it is entered into voluntarily and on a valid consideration and does not violate public policy or contravene any statute. But this rule cannot be extended to cases in which to hold the parties liable as on a bond at common law would be to charge them with liabilities and obliga-

> tions greater than, or different from, those which they assumed in the instrument executed by them. Moreover, in order to uphold a bond as a valid common-law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed."
>
> 9 C. J. 27.
>
> "A bond, whether required by statute or order of court or not, is good at common law if it is entered into voluntarily by competent parties for a valid consideration, and is not repugnant to the letter or policy of the law; and such a bond, other than an official bond, is enforceable according to its conditions, although they are more onerous than would have been required if a statutory bond had been given for the same purpose."
>
> 9 C. J. 29.

In *American Surety Co. v. Butler,* 86 Mont. 584, 284 Pac. 1011, involving a bond given under the Grain Warehousing Act, the bond was referred to as not the statutory bond, because in excess of the statutory requirements, but a common-law bond executed in lieu of the statutory bond.

In *Palmer v. Vance,* 13 Cal. 553, recovery was sustained upon a redelivery bond upon attachment, notwithstanding that it was held that the bond was not required by statute, the bond being held valid as a common-law obligation for the payment of money, being upon a sufficient consideration; the court saying:

> "A bond taken by the sheriff is not void for want of conformity to the requirement of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property is valid at common-law."

In *Baker v. Bartol,* 7 Cal. 551, the bond sued upon was exacted by a court in a receivership proceeding from the defendant in that proceeding to avoid the appointment of a receiver. The bond ran to the state, but the suit on the bond was brought directly by the beneficiary. It was held that the bond was voluntary and good at common law notwithstanding that the court had no right to require the bond; that having received the benefit of the court's order, the surety was estopped from denying the legality of the bond.

In the case of *State to Use of Benton County v. Wood,* (Ark.) 10 S. W. 624, the bond involved was a county treasurer's bond. No obligee was named in the bond, but it was held that recovery could be had in the name of the state; that technicalities could be brushed aside and the bond construed like any other contract in writing according to its plain intent, although not fully and particularly expressed; that the condition which shows the design of the bond is the important requirement and the naming of the obligee is the "merest formality." We quote further from the opinion:

> "It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come to his hands, and, if we regard the bond in suit as a common law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern; that is, anyone who should be injured by the treasurer's official delinquency."

To the same effect see the case of *Bay County v. Brock,* (Mich.) 6 N. W. 101.

In the case of *People to Use of Houghton v. Newberry,* (Mich.) 116 N. W. 419, a contractor's bond was involved which was conditioned, among other things, that all debts contracted by the principal for labor or material would be discharged. The bond recited that it was given pursuant to a certain named statute. The action was by a materialman. It was held that the statute did not require the bond but recovery was allowed none the less upon common law principles, holding that the surety evidenced the intention to make the bond effective for the use of any party interested, which was equivalent to a proposal to such party to guarantee payment of his account, which proposal, it was held, the use plaintiff accepted. We quote from the opinion:

> "It is true that the law did not require this proposal to be made. But that circumstance is unimportant. Appellant made it. The case would be very different if the bond had stated that liability was conditioned upon the applicability of the statute to the contract therein described."

In *Finley v. City of Tucson,* (Ariz.) 60 Pac. 872, the bond was given by the successful contestant for a city office in an election contest, its condition being to refund the salary paid in case of reversal on appeal. Recovery was allowed notwithstanding that there was no statute authorizing such a bond.

In *Bowen v. Lovewell,* (Ark.) 177 S. W. 929, the bond was given by the contestee in an election contest who had been unsuccessful in the lower court but had appealed. The governor, as a condition to issuing his commission to the contestee, exacted the bond, wherein the sureties agreed, in consideration of the

issuance of the commission, to pay to the contestant all emoluments of the office if it was finally determined on appeal that the contestant was entitled thereto. No obligee was directly named in the bond. None the less, in a suit by the contestant, recovery was allowed, the court holding contestant was a privy to the bond upon the ground that by express terms he was named as beneficiary. It was also held that the bond was not without consideration and was not extorted for the reason that the contestee was not entitled to the commission under the statute. Thus the contestee got what he was not entitled to, thereby affording a sufficient consideration for the bond.

In *LaCrosse Lumber Co. v. Schwarz,* (Mo.) 147 S. W. 501, the bond was given to protect laborers and materialmen upon a public contract job, but no such bond was authorized or required by statute. It was held that though the bond was voluntary and not authorized by statute it was valid since it did not contravene public policy nor violate any statute and that it could be enforced by a third person for whose benefit the bond was clearly made, as well as by the state.

In *Braithwaite v. Jordan,* (N. D.) 65 N. W. 701, the bond involved was a bond on appeal which was not in the form as provided by statute, but recovery was allowed as upon a common law obligation.

The case of *State v. Cochrane,* (Mo.) 175 S. W. 599, is very similar in its facts. The laws of Missouri required a grain elevator to furnish bond and obtain a license and submit to regulation. This law, or certain sections thereof, had been declared unconstitutional. An elevator company had applied for a license

under the law and furnished the bond as a condition to the issuance of the license. The condition of the bond was that the licensee should faithfully perform his duty as a public warehouseman under the laws of the state and comply with the laws of the state relating to public warehousemen, together with other conditions. The statutes under which the bond was issued were held to be unconstitutional and therefore to have no application or force, but notwithstanding, it was held that the bond was valid and enforceable as a common law bond. It was further held that a beneficiary, though not named in the bond, might sue in the name of the state. The action was entitled as is our action, "State for the use of etc.". We quote from the opinion:

> "It (the bond) was executed by appellant for a price paid or promised. The surety company desired a premium and, to gain that, executed the bond in suit. It had no other relationship to the business conducted by the Cochrane Grain Company and no connection with its occupation than for an agreed consideration to indemnify the public against the breach of certain duties imposed upon its principal by law. It entered into that contract without any other coercion than a motive of profit - - - *If no statute had ever been enacted regulating that business (public warehouseman) the common law obligations would still subsist.* Hence, if we should concede for the argument only that all statutory provisions on the subject are at an end, still the duty was imposed upon the principal by the nature of his business and his receipt for the goods to surrender the property upon proper demand or to show a valid reason for refusal. *The fact that the bond in question embodied conditions to comply with the statutory regulations does not prevent the enforcement of other obligations expressed,, which, though*

not prescribed by statute, were the common law duties attached to the business of public warehouseman. - - -

"It is a settled principle of law in this state that a voluntary bond not opposed to public policy and resting on a sufficient consideration is enforcible or binding as a common law obligation - - -

"The trend of judicial decision, as well as the object of the statutes are to compel the rigid observance of contracts of indemnity made by corporations licensed to engage in that business for profit - - - Such suretyships, being for a gainful purpose, do not logically fall in the category of sureties for accommodation, who are favorites in the administration of the law, and are exonerated in all cases where a strict construction of their contract does not bring them within its provision."

The italics are ours.

Thus it will be seen from this last case, as in the principle involved in all of the cases, the filing or lack of filing of the bond is of no censequence. The Missouri statutes having been declared unconstitutional, there was no statutory provision or authority for filing the bond. Consequently any attempt at filing was of no effect and there was no legal filing. So also as to the suit in the name of the State of Missouri. The court encountered no difficulty in justifying a suit in the name of the state notwithstanding that there were no valid statutes which gave the state any authority to receive such a bond or to enforce it. All technicalities are brushed aside and the bond is enforced according to its tenor and effect.

2. *The Failure to File the Bond or Procure a License is Immaterial and Cannot Defeat Recovery.*

As can be seen from the foregoing, the bond need be filed with no one in order to make it effective. If the bond is good in accordance with its terms and has been issued and put forth with the intent to make it effective, then certainly no other conditions can be attached which are not expressed in the bond, and to say that the bond must be filed with the Commissioner of Agriculture or with any other state authority, is to state an absurdity and to seek for excuses merely, wholly without warrant.

This precise point was before the Montana Supreme Court in *Pue v. Wheeler,* 78 Mont. 516, 255 Pac. 1043. The suit was upon a bond given for the release of attached property. Defendant pleaded failure of consideration upon the ground that the bond was not filed with the clerk of court and that it was not in the statutory form. The court disposed of this defense as follows:

> "If not good as a statutory undertaking, it is good as a common-law bond, to be measured by the plain wording of its terms. - - - Irregularities of procedure do not invalidate it. - - -
>
> There is no merit in the contention of lack of consideration. Defendants got that for which they executed the undertaking, return to attachement debtor of his property, and they may not complain of lack of consideration."

The plea that the bond must be filed is again founded upon the assumption that this action must be grounded upon a statute and that appellant can escape liability if its principal, Chatterton & Son, does not strictly obey the statute. This action, however, is not predicated upon any statute. The liability here sought to

be enforced is founded upon the plain import of the language of the bond and the circumstances under which it was written. The consideration for the bond is not found in any statute or in any requirements of statutes that a license be obtained, or in the actual procurement of any license. Consideration, rather, is found in the premium exacted for the bond ($100.00) and in the inducement offered to bean growers by the security of the bond, and in the benefit afforded to the principal in thereby being able to attract business.

It is argued that the bonding company was in some manner injured because the bond was not properly filed and because a license was not issued. Just why the appellant was thus injuriously affected, is not made clear. Certainly the filing itself would in no way advantage appellant and the failure to file could in no way do injury nor increase the liability. Nor would the issuance of a license alter the situation. Licensing implies permission or authority to do business. Certainly the risk of the surety would in no way be decreased when the state officially grants authority or gives license to do business. Licensing does not imply supervision, and supervision does not depend upon licensing. If by the state law the Commissioner of Agriculture was authorized or directed to supervise such warehouses, his hand would certainly not be stayed because he had not first issued a license. In fact if a license had not been issued and was required, the first act of supervision would require that he close the warehouse and prevent the doing of business. Thus the very failure to issue a license would prevent business and thereby avoid liability to the surety.

Nor does appellant's counsel enlighten us as to why the bond-

ing company should assume that Chatterton & Son would operate as and be supervised as a grain warehouseman alone. The testimony shows that the agent who wrote the bond knew that they handled beans alone in this warehouse and the court so found, as will hereafter be pointed out. There is not one word of testimony indicating that any representations were made to the bonding company as to the purpose of the bond, other than the application therefor, and that discloses nothing except that a public warehouseman's bond is required. Most of the questions are left blank, further demonstrating that the agent was entirely familiar with the business of Chatterton & Son and the purpose of the bond (Tr. 95-98). For that matter, we find no regulatory powers indicated in the Grain Warehouseman's Act which might have prevented this loss and defalcation. Furthermore, the testimony shows that the Commissioner of Agriculture did interest himself in the affairs of this warehouse and made inquiries and required statements. He could have done nothing more had a license been issued. The loss would have followed as inevitably.

What has been said under this head disposes of the action of the court in striking the affirmative defenses from the answer, (Specification of Error No. IV) and, as well, the rulings of the court sustaining objections to defendant's questions. The rulings of the court complained of involved the cross examination of the witness Healow (Specifications No. X, XII.). These special defenses and these questions involved the matter of the filing of the bond and the failure to obtain a license. They challenge the very legal issue upon which we stand. To permit the defenses to stand or to permit the evidence to go in would

defeat recovery. That is the whole issue here at stake. It must be plain enough, and has been from the beginning, that appellees stand upon the proposition that the bond need not have been filed and a license need not be issued. Recovery is sought as upon a common law bond, and upon that proposition only.

In passing, however, it may be noted that with respect to the exclusion of evidence, appellant made no offer of proof and did not protect his record in that respect. He cannot complaint, in any event, for the exclusion of evidence.

3. The Intent of the Parties Under the Bond Was to Protect The Storage of Beans and, If Necessary, the Bond Should Be Reformed Accordingly.

The word "grain" is defined in Webster's New International Dictionary as follows:

> "A single small hard seed. - - - collectively: a. The unhusked or the threshed seeds or fruits of various food plants, now usually, specif. the serial grasses, but in commercial and statutory usuage (as in insurance policies, trade lists, etc.) also flax, peas, sugar-cane seed, etc."

Broadly, then, it would seem that the word could include beans when, in the condition of the bond, the "owners of grain stored in said warehouses" are indemnified. Remembering that all parties concerned knew that this warehouse was for the storage of beans alone, and the storage of wheat or other similar grain was in no way involved, it must be assumed that the word was used in its broadest sense.

Reference is here made to the statutes of Montana governing interpretation of contracts. As provided by *Section 7527* a con-

tract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract. By *Section 7531* it is provided that when, through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. By *Section 7534* it is provided that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done, without violating the intention of the parties. So by *Section 7538* a contract may be explained by reference to the circumstances under which it was made. By *Section 7545* where uncertainty is not removed by other rules of interpretation, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, and the promisor is presumed to be such party. And by *Section 7547* all things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom.

Attention is called to the case of *McDonald v. McNinch,* 63 Mont. 308. The contract there involved was a lease on shares. The lessor attempted to avoid the lease upon the ground that it was void for uncertainty in failing to provide who should bear the expense of putting in the crop or preparing the ground or harvesting the same, etc. The contract was silent as to these matters. The court said:

> "From the fact that plaintiffs (lessees) were to have possession of the lands and personal property for the purpose of producing crops upon the land, it is implied that they were to do all work, furnish all materials, and

> pay all expenses necessary to that end, except insofar as defendants bound themselves specifically to do part of the work, furnish part of the materials, or pay part of the expenses, - - - "

The court held the contract to be subject to interpretation and that it was not void for uncertainty. No question of reformation was raised, notwithstanding that the contract clearly did not contain all terms required for its proper execution.

Moreover this bond does not merely "indemnify the owners of grain stored in said warehouses," but further requires that the principal, Chatterton & Son, shall "faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana." The laws of this state as governing warehousemen are covered by the chapter on Deposit For Hire (Sections 7660 and following). The depositary is bound to return the identical thing deposited (Section 7640). The depositary must deliver the thing deposited to the person for whose benefit it was deposited, on demand (Section 7642).

The relationship between the warehouseman and the owner of the goods stored is that of bailor and bailee for hire.

67 C. J. 452.

Among the duties of a warehouseman is the duty to deliver the goods on reasonable demand.

67 C. J. 453.

Thus, whether "grain" as used in this bond includes beans or not, Chatterton & Son did not "perform all the duties of and as a public warehouseman." And Chatterton & Son did not "fully comply in every respect with all the laws of the State

of Montana." Nor need we search so carefully for the precise words contained in the bond to fix liability upon appellant. The intent of the parties is clear, both from the language used in the bond and the circumstances. Chatterton & Son wanted a bond for their Billings warehouse so that they could advertise themselves as a bonded warehouse and offer it as an inducement to prospective depositors, as well as the natural and commendable desire to protect thir depositors. Appellant was engaged in the business of furnishing such bonds and, giving appellant company all of the best of it, and resolving every issue in its favor, at the very least its agent made no effort to inquire into the kind of commodities that were to be stored in the warehouse, contenting himself with his general knowledge of his client's business, which he knew included the warehousing of beans. In fact he knew that the business of Chatterton & Son in its Billings warehouse was beans exclusively (Tr. 192). It is true that he denied, in his deposition, that he intended the bond to protect the owners of beans instead of grain, but the court resolved this issue against appellant and found that, at the time the bond was written, the agent knew that Chatterton & Son were engaged exclusively in the bean business at Billings and that it operated a warehouse there exclusively for the storage of beans (Tr. 119) and that the bond was intended to indemnify the owners of beans (Tr. 120). The finding of the court upon this disputed issue of fact can hardly be disturbed on appeal. The finding is amply supported by testimony.

In his deposition, the agent admitted that he was familiar with the character of the business of Chatterton & Son and knew that it was engaged in the bean business and was reputed

to be one of the largest bean jobbers in the country. Notwithstanding that his deposition was taken long after the deposition of Mr. Chatterton (who testified that the agent knew the company was engaged exclusively in the bean business at Billings), the agent in his deposition did not deny that he knew that fact. Furthermore he admitted, with respect to the statement in the application for the bond that it was sought as a public warehouseman's bond, that he did not inquire particularly as to what kind of a warehouse was there meant or for the storage of what kind of goods or property, but explained that it was his general impression that "various commodities" were to be stored in the warehouse (Tr. 248-249). Various commodities could of course include beans. We thus have the agent admitting that he understood that the bond, given upon a public warehouse, would protect the "various commodities" there stored.

The agent further admitted in his deposition that it was of no interest to him, in supplying the bond, whether beans or grain were to be stored in the warehouse (Tr. 248). He also admitted that it would make no difference to him in furnishing the bond (Tr. 249).

Aside from the agent's actual knowledge of the business of Chatterton & Son, it is a general principle of law that an insurer is charged with knowledge of the business of the warehouseman insured and its nature.

Indem. Ins. Co. of No. Am. v. Archibald, (Tex.) 299 S. W. 340.

It is also a general rule of law that if the warehouseman may be held liable on the bond, the surety is also liable thereon.

67 C. J. 459.

Thus the surety, as well as the warehouseman, may be held liable on the bond for any act of conversion on the part of the warehouseman.

67 C. J. 460.

It does not appear to us that reformation of the bond is necessary, and we believe that the court's holding in that respect is correct. However reformation is eminently proper and is supported by the evidence. We cite the Court to the following evidence in that respect:

Healow testified that he asked the Lansing office to procure the bond *for the protection of the growers* (Tr. 131). At his request the Lansing office of Chatterton & Son procured the bond through the agent who had for many years been doing the company's bonding business. As before stated, this agent knew intimately the officers of Chatterton & Son and knew that their business was particularly the bean business and the business at Billings exclusively the bean business. We have then here positive and authoritative testimony that the bonding company, through its representatives, knew that the bond here sought and required was for the storage of beans and beans alone. The principal and surety thus alike knew they were dealing only with beans. Therefore they intended beans.

Apparently no one gave any attention to the form of the bond. The conclusion is thus inevitable that the bond as written, containing the word "grain" (if "grain" does not include "beans") does not express the intention of the parties and the use of the word "grain" was inadvertent and a mutual mistake and the bond should be reformed accordingly. The court so found and

we submit its finding in this respect is amply supported by the testimony.

The case of *Commercial Casualty Ins. Co. v. Lawhead,* 62 Fed. (2d) 928, is very much in point on this question, as well as upon other matters involved in this case. The bond there involved was given to indemnify the plaintiff against the loss of a deposit in a bank upon a time certificate of deposit. By mistake the wrong printed form of bond was used, referring to a deposit subject to check instead of a time certificate of deposit. The action was originally brought at law and recovery denied upon the first trial in the lower court, upon the ground that the condition of the bond did not cover the loss. Upon appeal the Circuit Court of Appeals remanded the cause with instructions to transfer the case to the equity side of the court with leave to amend appropriately for reformation. Upon the second trial judgment went for the plaintiff, which was sustained upon appeal. The Circuit Court of Appeals held that if this bond did not secure the deposit in question, it never secured anything and defendant received a premium for nothing; that there was no doubt that both plaintiff and the bank intended and understood the bond guaranteed this specific deposit; that the printed form used was apparently not appropriate to express the true purpose; and that defendant bonding company should not be "allowed to escape liability because of the mistake in reducing the contract to writing or selecting the form of bond to be used;".

This case is also very much in point upon the question as to whether Chatterton & Son should be joined as a defendant, covered in our next subject head. The principal in the bond

was the bank referred to, a Pennsylvania corporation. The suit arose in West Virginia. The objection was made, as here, that the bank was a necessary party to the suit, after reformation was requested, and that without the bank as a party the court was without power to decree reformation. The decree in this case had provided that, upon payment of the liability of the bond by defendant, the complainant should be required to assign the certificate of deposit to the defendant. Aside from this, the Circuit Court of Appeals in its opinion said:

> "We think that the bank and its receiver fall within the classification of conditionally necessary but not indispensable parties, i. e. of parties who have an interest in the controversy, but one which is separable from that of the parties before the Court and will not be affected by a decree entered in their absence."

The court then quoted from *Halpin v. Savanah River Electric Co.*, 41 Fed. (2d) 329, classifying parties as, (1) Proper parties, (2) Conditionally necessary parties and (3) Indispensable parties, the first two of which need not be joined if beyond the jurisdiction of the court or if their joinder would result in ousting the jurisdiction. The court also quoted from *Silver King Coalition Mines Co. v. Silver King Consol. Mining Co.*, 204 Fed. 166, as follows:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject matter which

which is separable from the interest of the parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him."

4. Chatterton & Son Is Not An Indispensable Party.

The amended complaint alleges in Paragraph II that Chatterton & Son had never qualified to do business in Montana (Tr. 55). Likewise as to Chatterton & Son, Inc. (Tr. 60). The allegations as to Chatterton & Son are admitted by the answer in paragraph II (Tr. 79). Thus Chatterton & Son was a foreign corporation with no agent designated in the state upon whom to serve process and no other officer or agent in the state at the time the action was brought upon whom process could be served. In fact, prior to the time the action was brought and prior, in fact, to the breach of the bond, Chatterton & Son had been dissolved as a corporation by order of the District Court of the State of Michigan (Plf. Ex. 5, Tr. 180-182).

As to Chatterton & Son, Inc., at the time the complaint was filed it had no remaining property or assets, having previously turned over all its assets to the Commissioner of Agriculture to settle for its liability as far as possible. Other assets had previously been turned over by it to a new company organized for the purpose. Thereafter Chatterton & Son Inc. had no remaining property and went out of business (Tr. 195, 196, 197-198).

We have thus a situation where it was impossible to find or serve any person as the principal of said bond and where, in

any event, no satisfaction could be obtained by any judgment. It is, in truth, doubtful to say the least whether Chatterton & Son, Inc. could be considered as the principal in the bond. Appellant has not so contended. And as to Chatterton & Son, it was out of existence, expired. If appellant's argument were to prevail, the court would have been ousted of jurisdiction and appellees would be completely barred of recovery.

The matter is covered by *Section 50* of the Judicial Code (Title 28 U. S. C. A. 111) and Equity Rule 39. *Section 50* reads as follows:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 39 reads as follows:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and

in such cases the decree shall be without prejudice to the rights of the absent parties."

In addition to the case of *Commercial Casualty Ins. Co. v. Lawhead,* referred to above, there are abundant cases cited under these provisions in U. S. C. A., to which reference is made.

In any event, the plea that Chatterton & Son is a necessary party for reformation will not stand analysis, and so likewise as to Chatterton & Son, Inc. The only excuse for such a plea is the claim that the surety could not be subrogated where the bond is reformed without the presence of the principal. This overlooks the fact that the ordinary rules of suretyship do not here apply and this instrument is more in the nature of an insurance policy. Furthermore the liability of Chatterton & Son itself to appellees is in no way dependent upon reformation of the bond. Chatterton & Son's liability arises from its defalcation, not upon its signature to the bond. The signature was a pure formality. The case of State v. Kronstadt, cited by appellant on page 42 of its brief, does therefore not apply. In that case the action was upon a bail bond with private sureties, not a compensated surety company. In this case, without any doubt, if Chatterton & Son were still a going concern, appellant, by this judgment, could be subrogated to the rights of appellees and recover against Chatterton & Son upon its defalcation as a warehouseman.

5. The Action is Properly Brought in the Name of the State of Montana Under the Terms of the Bond.

It is contended that there is no authority by statute to take the bond in the name of the State of Montana nor for the State

of Montana to sue. We submit that no statutory authority is needed to render the bond valid as running to the state and to permit the suit to be brought in the name of the state for the benefit of those who suffered the loss. The bonding company having undertaken the obligation, having been duly compensated therefore, and in its duly executed contract having named the obligee, we challenge its right to question its solemn engagement. It is, by its act, estopped to question or inquire into the right of the obligee to enforce the obligation. By the execution of the contract, appellant, as the obligor, has vested the legal right to the cause of action in the obligee named, and it is of no concern to the obligor who might be benefited or where the benefits or proceeds of the action might ultimately go.

Reference is first made to the Montana statute, Section 9067, which reads as follows:

> "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

The Montana Supreme Court has strictly interpreted the statute to require that the action be brought in the name of the party who is the legal owner and holder of the cause of action. Thus in the case of *County of Wheatland v. Van,* 64 Mont. 113, 207 Pac. 1003, the action was upon a bail bond running to the State of Montana, but the action was brought by the County

of Wheatland for the reason that under the law the amount recoverable was repayable to the county. However the court held that the action could not be maintained in the name of the county, notwithstanding that the benefits were to run to the county. The court said:

> "It is an action on contract. The bond on its face disclosed the party entitled to maintain an action thereon in the event of breach. Although the money recovered goes to the county, yet the contract is with the state, not the county. What disposition is made by the state of the amount recovered is a matter of no concern as regards an action to recover on the bond. The state is expressly made the trustee of the money recovered on such obligations, and the law prescribes its disposition. It is merely a matter of state administration. There is no privity of contract between the county and the sureties on the bond, and therefore the judgment in favor of the county cannot stand."

See also *Genzberger v. Adams,* 62 Mont. 430, 205 Pac. 658, and *Martin v. American Surety Co.,* 74 Mont. 43, 238 Pac. 877.

In referring to the fact that the codes have relaxed the strict rules of the common law so as to enable the party directly interested, under many circumstances, to prosecute the action directly, the text in 20 R. C. L. 665 continues as follows:

> "This is not to be understood, however, as excluding one holding the legal title or right from suing in his own name. Such person may sue as the real party in interest, if he can legally discharge the debtor and the satisfaction of the judgment rendered will discharge the defendant, although the amount recovered is for the benefit of another; and if the real party in interest is the plaintiff, an objection that the contract sued on was

made by him as agent for others will not be considered. When a suit was properly commenced in a state court in the name of the real party in interest, under such a statute, and has been removed to a federal court, it may proceed in the name of the party who was the plaintiff in the state court, and when an action has been begun in a federal court, that court will follow, as a rule of practice, the decision of the supreme court of the state as to what constitutes a real party in interest under the state statues."

See also 20 R. C. L. 667 and 1 Bancrof's Code Pldg. 236-241.

Where the board of education which was erecting a building, took a bond running to itself, notwithstanding that the statute required that the bond should run to the state, in an action brought by the board in its own name, the court said:

"The statute requires the exaction of a bond for the protection of the sub-contractors, laborers and material-men, and it can make no difference in the application of the rule that the entire public are not the beneficiaries. The obligor has consented to make the board of education instead of the State the trustee for the interested parties."

Board of Education of Detroit v. Grant, (Mich.) 64 N. W. 1050.

Where a bond was given conditioned that the principal, charged with bastardy, would marry the prosecutrix and support her for a period of years, the bond providing that the amount thereof, in case of default, should be paid to the county judge to be by him distributed in accordance with his discretion; in an action upon the bond by the prosecutrix, it was held that no cause of action was stated in that the prosecutrix was not named as obligee in the bond, the county judge being the trustee of an

express trust and the holder of the legal title to the trust fund and as such being the only one who could sue to recover the trust fund except where he neglected or refused to perform his duty, in which case he should be made a party defendant and that fact set up in the complaint by the cestui que trust.

Meyer v. Meyer, (Wis.) 102 N. W. 52.

In a suit to recover damages for the failure of a city council to exact a bond as required by statute, for the protection of laborers and materialmen, it appeared that the city council did take a bond, but running to the municipality, while the statute required the bond to run to the people of the state. It was held that no cause of action was made out for, notwithstanding the statutory bond was not taken, yet the bond actually given was a common law bond which could be enforced by the municipality in an action in its name for the use of the materialman; that no cause of action lay in the name of the materialman himself; that no one could sue as plaintiff who did not have a legal interest, unless permitted to do so by statute. In this case it was held that the city was a trustee and could do nothing which would legally discharge the bond or effect the interest of the beneficiary. The court further said:

> "The city had the power to contract for the public work undertaken by Larson and the power to take from him a bond conditioned for the payment of labor and material. The duties of a mere promisee in such a bond are purely nominal and only for the purpose of furnishing someone who might be a plaintiff."

Stephenson v. Monmouth M. & M. Co., (Circuit Court) 84 Fed. 114, 117.

In a bond made payable to the commissioners of a drainage

district, where it was claimed that the action on the bond should have been instituted in the name of the board of supervisors of the county, it was held that the commissioners of the drainage district were the proper parties paintiff, the court saying:

> "The general rule is that the obligee of a bond is the proper party to enforce it - - - Certainly the plaintiff in error (surety company) after receiving a premium, as a consideration for executing a bond and in which the defendant in error was named as obligee is estopped to deny the capacity of the obligee to sue for a breach of the bond."
>
> *Equit. Surety Co. v. Board of Commissioners,* 256 Fed. 773, 775.

We quote other expressions of courts:

> "Where as in this case, the defendants have entered into a contract with the people of the state to do and perform certain things though the beneficiaries for whose benefit the promise is made are then undisclosed, and though they may be entirely without remedy when they spring into existence which they can enforce as to the promisee, there is on the part of the state a legal obligation which it may or may not admit."
>
> *People for the use of Colorado Fuel & Iron Co. v. Dodge,* (Colo.) 52 Pac. 637.

> "With certain exceptions every action must be prosecuted in the name of the real party in interest. Code Civil Proc. 367. But here the undertaking was in legal effect given to the party plaintiff in the ejectment, to whom, as the court below finds, was delivered the possession of the demanded premises. If the grantees of the plaintiff, of a date prior to the judgment, acquired any interest in the value of the use and occupation of

the defendant in the ejectment, it was one to be enforced against or in the name of their grantor. As to the undertaking, it is to pay plaintiff the value of the use and occupation. In legal effect the contract is made with him, and if others have claims on him with respect to it, he should be held as to them to be trustees of an express trust, authorized to sue on the undertaking."

Walsh v. Soule, (Cal.) 6 Pac. 82, 84.

The principle involved seems plain. It does not lie in the mouth of appellant to raise any question as to the right or capacity of the state to sue, since by executing the bond to the state it has confirmed that right insofar as the appellant is concerned. The principle is stated in 47 C. J. 26, as follows:

"The legal owner may bring his action for the use of whatever person he may choose. The legal owner's selection of a use-plaintiff is a matter with which defendant is not in any way concerned. So far as defendant is concerned, it is not necessary that the use-plaintiff should in fact have any interest or connection otherwise with the subject matter of the action. However, such an action must not prejudice any defenses which defendant may have had.

"The beneficial owner has the right to bring an action to his use in the name of the legal owner or, after his death, in the name of his administrator, without consent or authority, and even against the expressed wish of the legal plaintiff. The legal owner has not the right to refuse the use of his name as plaintiff by the beneficial owner; he cannot prevent the use of his name; and courts of law will protect the equitable right and will compel the nominal plaintiff to permit his name to be used for the recovery of the claim. Where the legal owner has a cause of action against defendant, it is

immaterial, so far as defendant is concerned, whether the use-plaintiff has any interest or not, that being a matter which concerns the legal and use-plaintiffs, and not defendant."

Quoting again from 47 C. J. 27:

"It has been held that there are three classes of cases in which there may be a use-plaintiff: (1) Where a contract is made between the legal plaintiff and defendant, largely for the benefit of other parties who may or may not be known at the time it is made, the legal plaintiff being interested only because it will aid in securing a proper performance. (2) - - - "

Quite aside from the matter of estoppel, there appears to be no good reason why in any event the state could not prosecute this suit, as is here done.

"Although a state is not pecuniarily interested, it may be the proper party to sue under the terms of a statute declaring that any "person" expressly authorized by statute may sue in his own name without joining the beneficiary; and where a bond has been executed to a state, for the benefit of another, an action upon the same may properly be brought by the state upon the relation and for the use of the person beneficially interested."

59 C. J. 324.

"Although the right to sue is sometimes expressly conferred by statute, it is well settled that, independently of any statutory provision therefor, a state may sue in its own courts either as sovereign, or by virtue of its rights as a political corporation."

69 C. J. 299.

"A state may become a party litigant only through the instrumentality of an agent or person designated by stat-

ute, or empowered by recognized principles of law, to act for it in the matter at hand. Authority to institute or defend actions on behalf of a state usually resides in the attorney general or other executive law officer of the state; and the fact that a suit, brought in the name of the state, is brought or conducted by the attorney-general, or other law officer, is ordinarily sufficient to show that the suit is authorized by the state, even though the attorney-general is prohibited from bringing the particular suit unless advised to do so by certain other officers."

69 C. J. 322.

There are here about 135 bean growers involved. Assuming that, notwithstanding the Montana decisions indicated above, they could sue in their own names, each would then have an independent cause of action, requiring 135 separate suits, for while they could all assign their causes of action to one person, they might not be willing to trust such person and certainly are not required to do so in order to enforce their rights. Furthermore, in view of the fact that the amount of this bond is insufficient to satisfy all of the claims, the individuals could not sue without interfering with each other's rights or exceeding the penalty of the bond.

This action was commenced by the Attorney General of the State of Montana. The complaint was signed by him as such and sworn to by him on behalf of the state (Tr. 11-12). It has since been prosecuted by the Attorney General of the state through three administrations. The Attorney General participated in the trial. He now presents this brief on behalf of the state, as plaintiff. There can be no doubt of his authority, and

no doubt that the action is being properly and legally prosecuted by the state as the obligee in said bond to enforce the penalty and obligation thereof.

6. The Evidence Establishes Breach of the Conditions of the Bond and Loss and Damages Exceeding the Penalty Thereof.

The trial court, in its decision, made and stated its findings of fact and, among other things, found that the beans stored in the Chatterton warehouse were, from the beginning, treated by Chatterton & Son as their own, and that when the beans were shipped from the Billings warehouse, they were shipped with the intention of converting them, and that they were shipped without the consent of the owners and without their knowledge (Tr. 116). The court also found that all but 12,000 sacks of the beans (which would be 27,897 sacks) were shipped from the Billings warehouse between September 1930 and June 1931 (Tr. 115).

Thus the court has found that all of the beans were converted to their own use by Chatterton & Son during the life of the bond.

Appellant contends that the record does not show when the beans were converted and quotes certain evidence from the testimony of the witness Healow and the witness Chatterton from which it is argued that the shipments from Billings were innocent and honest and that there was no actual conversion until the subsequent sale of the beans.

The question, however, is not whether there might be testi-

mony in the record tending to prove that there was no conversion, but the sole question upon this review is whether there is any testimony sufficient to support the court's findings. In that connection, let it be remembered also that Mr. Chatterton was the president of Chatterton & Son and Mr. Healow the manager of its Billings warehouse. Chatterton & Son was the defaulting principal in the bond, to all intents and purposes the adverse party to the plaintiffs in this action. It is the wrongful acts of Chatterton & Son that are involved in this suit and which are under scrutiny. What Chatterton & Son did with these beans, while in their possession, would be a matter peculiarly within the knowledge only of Chatterton & Son and its officers and agents. Thus the proof of the defalcation of Chatterton & Son had to come through the mouths of these same officers and agents, and the wrongful conduct of Chatterton & Son would have to be the confessed wrongful conduct of these officers and agents. It is hardly to be expected that they would brazenly confess their own wrong and, on the contrary, it is to be expected that they would try to alibi themselves and put an honest interpretation upon their acts. The testimony of these witnesses must therefore be considered in the light of the interest of the witnesses and the court may rightfully construe that testimony most favorably to the plaintiffs.

However that may be, we submit that there is abundant testimony in the record to support the court's findings. A reading of the testimony as a whole can leave no doubt that, from the beginning, from the time these beans were taken in for storage, they were not treated by Chatterton & Son as stored beans, and the ownership and title of the depositors was not honored.

On the contrary, from the beginning, Chatterton & Son treated these beans as though they were their own and as though they had bought them or had an interest in them. Between the offices at Lansing, Michigan and Kansas City, Missouri, and the office at the Billings warehouse, there seems to be a confusion of the facts. Mr. Chatterton, the president, seemed to labor under the impression that they had bought these beans or had some interest therein, probably because advances had been made against many of them. He was under the impression that only such beans were shipped out of the Billings warehouse as Chatterton & Son owned, and that the beans taken for storage were kept and preserved at the Billings warehouse. Mr. Healow, on the other hand, knew otherwise and knew that stored beans were being shipped, but he was only acting under orders from Kansas City and his alibi was that he thought they were merely being shipped to Kansas City for storage there.

Without attempting to point out all of the testimony bearing upon this matter, we call attention particularly to the following:

Mr. Chatterton testified that his company would make a request on Mr. Healow for *certain carloads* of beans covering *certain grades, and if he (Healow) had them he would ship them* (Tr. 202).

Mr. Healow testified that from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders he shipped them from time to time. He said that these beans shipped by him were the beans belonging to the various owners who had them stored at the Billings warehouse (Tr. 137).

Mr. Healow made confusing and contradictory statements

with respect to whether consent of the growers or any of them was obtained for such shipments. First he said *usually* consent was obtained (Tr. 137). Then he said there was no objection raised by the growers in some cases, to the shipments (Tr. 138). Finally he said *that it was not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent* (Tr. 138).

Healow positively testified that none of the owners of the beans ever authorized the company or consented to the sale or other disposition of the beans after they were shipped (Tr. 140-141). He also said that the company was not able to deliver in Billings the beans represented by the warehouse receipts after they had gone out (Tr. 140).

The warehouse receipt issued to each and all of these growers called for storage of these beans at Billings and contracted that the beans would be stored at Billings. The form of the warehouse receipt is in evidence as plaintiff's exhibit 4 (Tr. 129). Mr. Healow testified as to the manner in which the blanks in this form were filled out (Tr. 156-157). The blank left for the place of storage would be filled in with the word "Billings" (Tr. 157). As this testimony has been reduced to narrative form, it is not, in this respect, as positive as the actual testimony of the witness. The actual question and answer, as they appear in the reporter's official transcript of the testimony at the trial, read as follows:

> "Q. And the "Storage at," that would read "Billings," or what would it say?
>
> A. Well, they would all read "Billings." They were all stored here."

Counsel for appellant will no doubt willingly agree to such an amendment of the record.

Reconstructing the warehouse receipt (Tr. 129), by filling in the blanks as testified to by Mr. Healow (Tr. 156-157), it will then read something as follows:

> "Received from John Doe 1000 Sacks of Beans for Storage at Billings. Storage and Insurance 2c per cwt. per month or fractional part thereof. In event beans are purchased by other than the undersigned a handling charge of 5c per cwt. shall be collected. All weights are subject to natural shrinkage. Delivery to holders of Receipts shall be as provided by the Laws of Montana. Beans insured for benefit of owner.
>
> CHATTERTON & SON
>
> By....."

Mr. Chatterton testified that when the warehouse was closed at Billings there were not sufficient beans in the warehouse to satisfy the outstanding warehouse receipts (Tr. 195).

Mr. Harris testified that when he went to Kansas City, after the close of the warehouse, to pursue settlement on behalf of the owners of the beans, in his conference with the attorney for Chatterton & Son the attorney admitted that the beans had been sold and could not be accounted for (Tr. 219). He further testified that representatives of Chatterton & Son told him that the beans had been sold on a falling market; that the beans represented by the warehouse receipts had been sold (Tr. 220).

With respect to the history of the shipment and sale of beans, it appears that all of them were shipped out of the Billings

warehouse and sold thereafter. This was established by the records of the company. The records were kept by Mr. Healow, showing the history and disposition of each lot of beans received for storage (Tr. 137). These records included the dates of shipment of the beans, and all of these records were turned over to Mr. Lindsay, the accountant for the bean growers (Tr. 138). Mr. Lindsay received these records and audited them and made a tabulated report thereon, giving complete information as to each lot of beans, including the date of shipment and the market value on the date of shipment (Tr. 226-228). This tabulated report is in evidence as plaintiff's exhibit 18 (Tr. 19).

It appears that all of these beans were shipped out prior to the closing of the warehouse, except 12,000 sacks (Tr. 139). These 12,000 sacks were shipped out about July 13, 1931, all being loaded at one time, as rapidly as possible, day and night (Tr. 139). When this was discovered by the bean growers, the investigation was precipitated, and the auditor of Chatterton & Son in charge of the shipments was arrested upon a larceny charge (Tr. 217-218).

Upon arrival of Mr. Harris at Kansas City, there were only 10,000 bags of beans to be found in Chatterton & Son's warehouse there (Tr. 119), and these had been hypothecated to the bank by Chatterton & Son (Tr. 219), and these 10,000 bags were in process of going (Tr. 220). It appears from the report of the accountant, plaintiff's exhibit 18, that the largest part of the beans was shipped during the year 1930; that over 25,000 sacks were shipped out before the middle of February 1931, about 2000 sacks from that time until June 1931, leaving about

12,000 sacks in the warehouse on the 1st of July, 1931, which were the 12,000 sacks shipped on July 13, 1931.

It also appears from exhibit 18, and from the testimony of the witness Healow, that the market value of beans at the time of the earlier shipments in the fall of 1930 was as high as $4.50 per bag (100 lbs.) and that it steadilly declined, shipments about January 1st, 1931 appearing to be at a value of $3.50 per bag, but showing a value of $2.25 per bag at the time of the closing of the warehouse. It is, however, quite apparent, that because of these higher values at the time of earlier shipments, the heaviest part of the loss by far was suffered before January 1st, 1931.

The accountant, Lindsay, made certain computations taken from the report and found that, considering the conversion as having taken place on the dates of shipment and thus fixing the value on those dates, the net value of the beans converted, after crediting all advances and charges, was over $65,000.00 (Tr. 229). It is safe to say (and can be proved from the report) that about $50,000.00 of this loss was for the beans shipped out before July 1st, 1931, and during the life of the bond.

Thus, even though the last 12,000 sacks are excluded, a loss is proved of at least $50,000.00. The total net amount collected and salvaged by Mr. Harris for the bean growers, from these remaining 12,000 sacks of beans, or the equity remaining therein, and from the liquidation of Chatterton & Son's remaining assets, was about $23,000.00 (Tr. 222). Properly this should be charged against these remaining 12,000 sacks to the extent of their value. In any event, however, the loss is several times greater than

the penalty of the bond, $10,000.00. In fact, computed at $2.25 per bag, as was done by the accountant (Tr. 223), the net loss still far exceeds $10,000.00, still excluding the 12,000 bags.

The conversion here clearly took place in each instance at the date of shipment, at least. Certainly there can be no doubt that the court's conclusion was right and that these shipments were not innocent and honest. These beans were acceped for storage at Billings. They were returnable at Billings under the terms of the warehouse receipt and under the law. It cannot be supposed that they were shipped to Kansas City, a thousand miles away, with the intention of shipping them back when the owner of the beans called for them. The guilt of Chatterton & Son is beyond question. It was never denied by any of its officers or agents. Its attorney confessed it. Healow knew, when he made the shipments, that the consent of the owners was required (Tr. 137). Mr. Chatterton knew it and, in effect, admitted that the beans were not shipped for further storage, but were shipped for sale. He said that they sold only their own beans, and that it was not intended to ship any beans from the Billings warehouse that were taken for storage (Tr. 202). That is tantamount to saying that the beans that were shipped were shipped as the beans of Chatterton & Son and sold as such.

The rules governing conversion are too well known to require citation of authority. Here, in these shipments, was certainly an exercise of dominion by Chatterton & Son over the beans, acts and conduct hostile to and in denial of the title and right of possession of the owners of the beans, and in derogation of their rights.

"The basis of liability for conversion by a bailee is that

> he has done some act implying the exercise or assumption of title, or of dominion over the goods, or some act inconsistent with the bailor's right of ownership, or in repudiation of such right."
>
> 4 Cal. Jur. 35.

The removal or asportation of a chattel with an intent to deprive the owner of his property or possession is a sufficient assertion of ownership to constitute a conversion; and the removal of another's property out of the state, without the consent of the owner, is an unwarranted assumption of control of the property constituting a conversion.

65 C. J. 39.

See also 65 C. J. 29 and 37 as to what constitutes conversion under these circumstances.

It is, in fact, a conversion for a bailee to deviate from the contract of bailment by the removal of the property from the place where it was to be stored by the terms of the bailment. Thus it is the general rule of law that where the bailee, without authority, deviates from the contract as to the place of storage, and a loss occurs which would not have occurred had the property been stored or kept in the place agreed upon, the bailee is liable for the loss, even though he is not negligent. The general proposition is stated in 2 Cooley on Torts, 3rd Ed. pp. 1332, 1333, as follows:

> "Every bailee is bound, in his use of the property, to keep within the terms of the bailment. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the

interests of the bailor; it is enough that it is not within the contract."

There are innumerable cases supporting this rule.

Scott-Mayer Commission Co. v. M'erchants' Grocer Co. (Ark.) 226 S. W. 1060.

Thornton v. Daniel (Tex.) 185 S. W. 585.

McCurdy v. Wallblom F. and C. Co., (Minn.) 102 N. W. 873.

For additional cases see annotation in 12 A. L. R. 1322.

The basis for this holding is that, by such deviation from the terms of the contract of bailment, the bailee converts the property. Here, by the terms of the bailment as shown in the warehouse receipt and the surrounding circumstances, these beans were to be stored at Billings in this particular warehouse. They were not only removed from the warehouse but they were removed from Billings, and in fact out of the state. Quite aside, then, from the undoubted fact that the beans were removed from the warehouse and shipped to Kansas City with the intent to sell them, the fact alone of the removal and shipment to Kansas City, without more, constituted a conversion.

A demand and refusal, while here admitted (Tr. 219). need not be shown in this case because of the admitted impossibility of compliance with a demand. In any event, however, where there has been an actual conversion, the demand relates back to the date of the conversion, to fix the date of liability.

State v. Broadwater Elevator Co., (Mont.) 201 Pac. 687, 693.

The breach of the conditions of the bond and the ensuing

loss and damages (far exceeding the penalty thereof) during the life of the bond, are here abundantly established, and the findings of the court in that respect amply supported it. As pointed out in the Statement of the Case, the amount of the judgment ($13,100.00) is the amount of the penalty of the bond with interest added from July 15, 1931, to the date of the judgment.

CONCLUSION

It is respectfully submitted that no error has occurred throughout these proceedings; that the court acted within its proper discretion in granting leave to amend the complaint; that the bond is properly enforcible in accordance with its plain terms, and its penalty cannot be avoided upon the excuse that the bond was not filed and a license not issued; that these matters affirmatively pleaded in the answer constitute no defense to this action and were properly stricken; and that all of the parties concerned clearly intended the bond to cover and protect against the loss of beans.

Respectfully submitted,

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ENOR K. MATSON,
Assistant Attorney General.
R. G. WIGGENHORN,
Attorneys for Appellees.

No. 8428

3

United States
Circuit Court of Appeals
For the Ninth Circuit

FIDELITY and DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellant,

vs.

THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY THEREOF, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of CHATTERTON and SON, a corporation, at Billings,

Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Montana.

T. B. WEIR,
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Helena, Montana,
Attorneys for Appellant.

SUBJECT INDEX

TABLE OF CASES.

INDEX OF CASES—(Continued)

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Brief of Appellant

I. JURISDICTION.

In this action the complaint was originally filed in the District Court of Yellowstone County, in and for the State of Montana, on May 11th, 1932. The suit was an action at law on a public warehouseman's bond to the State of Montana, (Tr. pages 3-21). The complaint prayed for judgment in the sum of Twenty Thousand Dollars ($20,000.00), although the bond, a true copy of which was attached to said complaint, marked Exhibit "A", (Tr. 13-15), is in the principal sum of Ten Thousand Dollars ($10,000.00). On June 1st, 1932, appellant herein duly served

and filed a petition for removal of this cause from said State Court to the United States District Court for the District of Montana on the grounds of diversity of citizenship and the sum of money in controversy, as follows:

(a) That the plaintiffs were residents of Montana in that the said State of Montana and the Department of Agriculture thereof were suing on behalf and in the interest of residents of said State of Montana against this appellant, a corporation incorporated under the laws of the State of Maryland and a non-resident of Montana.

(b) That the matter and amount in dispute in said action, exclusive of interest and costs, exceeded Three Thousand Dollars ($3,000.00), all pursuant to Title 28, Section 41, U.S.C.A. (36 Stat. 1091). Notice, petition and bond on removal shown at pages 23-26 of Transcript.

On June 1st, 1932, the State Court duly made and entered its order removing said case to the United States District Court for the District of Monana and Transcript of Record with Certificate of Clerk was duly filed in said United States District Court on June 8th, 1932, (Tr. 31-32).

Exceptions were taken to orders of the lower Court allowing the filing of an amended complaint by appellee and the order of said Court allowing appellee's motion to strike affirmative defenses of appellant's answer by separate Bill of Exceptions duly filed, settled and allowed, (Tr. 76-78) (Tr. 107-111).

After trial the decision of lower Court in favor of appellee was rendered and filed on the 10th day of September, 1936, (Tr. 114-124) and final judgment thereon duly made, filed and entered September 19th, 1936, (Tr. 125-126).

The jurisdiction of this Court is invoked under Judicial Code Section 128 (a) as amended February 13th, 1925, effective May 13th, 1925, (43 Stat. L. 936, 28 U.S.C.A., Sec. 225).

II. STATEMENT OF CASE.

For many years prior thereto, and during the years 1929 and 1930, Chatterton & Son, a Michigan corporation with principal place of business at Lansing, Michigan, were engaged extensively over the United States in the general elevator and warehouse business. They handled hay, grain, beans, seeds, building material and supplies, coal (Tr. 198) and occasionally other commodities (Tr. 200, line 4). At first the principal part of the business was grain, but later the handling of beans grew to be the greater part of the business of said corporation.

In August, 1929, said Chatterton & Son opened a branch warehouse in Billings, Montana, with one R. J. Healow as their local manager. At this Billings Branch they handled beans. In December, 1929, Chatterton & Son, by written application signed by H. E. Chatterton, the President, and A. H. Madsen, Secretary of said company, at Lansing, Michigan, made application to the appellant herein, Fidelity and Deposit Company of Maryland, for a "Public Warehouseman's Bond" to the State of Montana in the sum of $10,000.00 (Tr. 95-102).

The application was made through appellant's agency, Dyer-Jenison-Barry Company, of Lansing, Michigan, and pursuant thereto, on January 7th, 1930, a bond was executed to the State of Montana to qualify Chatterton & Son under the laws of the State to do business as licensed pub-

lic warehousemen in the storage and handling of grain, which bond provided:

> "The condition of this obligation is such that, whereas the above bounden Chatterton & Son, being the lessee of a public local warehouse located at Billings, in the State of Montana, and owned, controlled or operated by the said Chatterton & Son, *has applied to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry, of the State of Montana, for a license or licenses to open, conduct and carry on the business of public warehouseman in the State of Montana* for the period *beginning January 1st, 1930*, and ending July 1st, 1930, in *accordance with the laws* of the State of Montana * * * * *
>
> NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of *grain stored* in said warehouse against loss and faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture hereto ***** then this obligation to be null and void, otherwise to remain in full force and effect." (Italics ours).

The bond covered the period from January 1st, 1930, to July 1st, 1930 (Tr. 13-15).

The bond was received by R. J. Healow, Manager for Chatterton & Son at Billings, Montana, in January, 1930, but was kept in his files some sixteen months, and never delivered to the Department of Agriculture of Montana until after its term had expired, and after the trouble over Chatterton's affairs had started, to-wit, May 12th, 1931, (Tr. 162, Ex. 8).

In the interim, and on July 10th, 1930, a certificate con-

tinuing said original bond in force from July 1st, 1930, to July 1st, 1931, was executed by appellant and, in turn, came into Agent Healow's possession in July, 1930, (Tr. 132, line 1-11). This was kept in Healow's files in Billings for a year and was not transmitted to the Department of Agriculture until after it, by its terms, had expired, to-wit, July 21st, 1931, (Tr. 176, Ex. 16). It is admitted that, prior to said date of transmittal of said continuation certificate, on July 2nd, 1931, Healow had been relieved of his management of the Billings branch, (Tr. 139, Par. 2), and the beans all shipped out of the warehouse by July 13th, 1931, (Tr. 18-19), on which date the warehouse was closed and Chatterton & Son ceased doing business.

At this time there was in Montana, statutes covering grain warehousemen and providing for the licensing, bonding and supervision of such warehouses dealing in grain, through the division of "Grain Standards and Marketing" of the Department of Agriculture, Labor and Industry of Montana, and giving the said Department of Agriculture the right to sue on said bonds "or do any and all things lawful or needful" for the benefit of holders of warehouse receipts. (Secs. 3574-3592, Revised Codes of Montana, 1921, as amended, pages .1. to .6. Appendix).

There was also a similar act passed as Chapter 50 of the Session Laws of Montana, 1927, which provided for the licensing and bonding of warehousemen dealing in "agricultural seeds", but which failed to have any provision relating to the intervention of the State of Montana through its Department of Agriculture, as did said grain warehousemen's Acts (Sections 3592.1—3592.9, Revised Codes

of Montana, 1921 and 1935, set forth at pages .6. to .9. Appendix).

That neither said bond nor renewal thereof was ever approved or filed with the State of Montana, nor the Department of Agriculture, Labor and Industry thereof, or came into their possession prior to Agent Healow's finding and subsequent mailing, as set forth supra is conceded (Tr. 132).

It is also an admitted fact that no application was ever made by Chatterton & Son for a license to conduct said business in the State, nor was any license ever issued by the State of Montana, nor any Department thereof, to said Chatterton & Son to engage in business as warehousemen, as provided under the Statutes and laws of the State of Montana, nor for any other purpose at all.

By July 13, 1931, the warehouse at Billings was emptied, the warehouse closed and Chatterton & Son ceased to do business.

Thereafter, the Commissioner of Agriculture of the State of Montana made demand on appellant for the penal sum of the bond, which was refused, and on May 11th, 1932, this action was commenced in the State District Court of Yellowstone County, at Billings, Montana.

This action to recover on said bond, brought originally in said State Court (Tr. 2) was, June 1st, 1932, removed to the Federal District Court for the District of Montana, Billings, Montana. Thereafter, on March 9th, 1933, defendant filed its answer, among other things asserting affirmatively that warehousemen, Chatterton & Son, had never been licensed, had never filed said bond with the

State of Montana, and further, that the bond sued upon was a grain bond and did not cover beans, for which recovery was sought.

On March 23rd, 1933, plaintiff filed its reply in the form of a general denial and the case was at issue.

Thereafter, on December 10th, 1934, plaintiff filed a motion for leave to file an amended complaint (Tr. 48-49) in equity—abandoning its former action based on the statutory bond and remedies provided under the Codes of Montana. The new complaint asked for the equitable relief of reformation, i.e., to reform the bond from one covering "grain" to cover "beans" and seeking recovery therein as a common law obligation.

Appellant filed written objections to the filing of said amended complaint on the grounds that (a) said proposed amended bill of complaint set up a new, separate and independent cause from a straight statutory action at law, to one in equity for reformation on grounds of mutual mistake, and recovery on reformed instrument as a common-law-bond. (b) That said new cause of action for reformation was barred by Sections 9032 and 9033, Revised Codes of Montana, and Section 4 of Section 9033, prescribing that an action for relief on grounds of mistake must be brought within two years after discovery of facts constituting mistake; that said application was not timely and appellee guilty of laches (Tr. 50-51).

After hearing, by a decision of lower Court of March 4th, 1935, (Tr. 52) Appellant's objections were overruled and filing of amended complaint allowed, to which action

of Court proper exception was taken and preserved by Bill of Exceptions, settled and allowed, (Tr. 72).

Appellant thereafter filed a motion to dismiss said complaint on the above grounds and, in addition, that amended complaint failed to state a cause of action and there was a defect of parties in that plaintiff failed to make Chatterton & Son, principal obligor on the bond, a party plaintiff or defendant in said action for reformation (Tr. 67-70).

Said motion to dismiss was denied on June 17th, 1935, and Appellant's answer to said amended complaint was filed on July 1st, 1935, (Tr. 78).

Appellees thereafter filed a motion to strike all of the affirmative defenses in said answer contained (Tr. 102-103), which motion was granted by order of Court of December 30th, 1935, to which ruling of the Court exception was taken and preserved by Bill of Exceptions, settled and allowed, (Tr. 111).

Thereafter said case was tried to the Court without a jury, resulting in a decision of the lower Court reforming said bond and finding the issues against Appellant herein. Pursuant to said decision, judgment was entered in said action on September 19th, 1936, for the sum of $13,100.00, with interest from July 15th, 1931, at 6%, and costs in the sum of $169.60.

At the beginning of the case Appellant objected to the introduction of any evidence on the grounds of failure of the complaint to state a cause of action and defect of parties plaintiff and defendant (Tr. 127), and at the close of all the evidence, made a motion to dismiss, based on the questions of pleading and law theretofore raised through-

out the cause and hereafter discussed, both of said motions above referred to being denied.

The main questions in this case, as we see them, and the order in which they arise, to be covered by the specifications of error herein and argument in their order are:

(a) Did the Court err in allowing plaintiff below to file said amended complaint?

(b) Did the court err in overruling Appellant's motion to dismiss said amended complaint?

(c) Did the Court err in sustaining the motion and striking from Appellant's answer to said amended complaint all of Appellant's affirmative defenses?

(d) Did the Court err on the trial in its rulings on evidence, motions, and in its findings and conclusions, practically all of which can be directly traced to the Court's refusal to adopt plaintiff's contentions as the law governing the case, i.e.:

(1) That said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

(2) That said bond contemplated the filing and approval thereof and the licensing and supervision of Chatterton & Son by the State of Montana as public warehousemen, and the fact said bond was never filed, approved or Chatterton & Son were never licensed by the State of Montana, nor any Department thereof, barred recovery on same.

(3) That there was never any delivery of said bond and the same was therefore void, either as a statutory or common law obligation.

III. SPECIFICATIONS OF ERROR.

Specification of Error No. II.

The Court erred in allowing plaintiff to file its amended complaint in this case. (Tr. 266).

Specification of Error No. III.

The Court erred in overruling defendant's motion to dismiss the amended complaint of plaintiffs, filed in this case. (Tr. 266).

Specification of Error No. IV.

The Court erred in sustaining plaintiffs' motion to strike from defendant's answer the first and second affirmative defenses therein contained and by deciding the facts stated in said affirmative defenses were not sufficient to constitute a defense to the cause of action stated in plaintiffs' amended complaint. (Tr. 266).

Specification of Error No. V.

The Court erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial thereof, on the grounds that the complaint failed to state a cause of action, either in law or equity, against the defendant and that there was a defect in parties plaintiff and defendant. (Tr. 267).

Specification of Error No. VI.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 2, as follows:

> "MR. WIGGENHORN: I offer Plaintiff's Exhibit 2 in evidence.
>
> MR. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with

the Secretary of Agriculture or any other department of the State of Montana.

THE COURT: I suppose some proof with reference to that will come later?

MR. WIGGENHORN: Yes, Your Honor.

THE COURT: As to what was done with it?

MR. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

THE COURT: Promptly?

MR. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in fact, after the beans were deposited, with the Commissioner. In the orderly proof we will present that.

THE COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

(PRINTER'S NOTE: Exhibit 2—Bond No. 3591931 here set forth in the typewritten record is already set forth in the printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.) (289)'' (Tr. 267).

Specification of Error No. VIII.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

''Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond

MR. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any

manner and not shown to have been made in the presence of any of the parties to this action.

THE COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and that their product would be secure, if stored there.

MR. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

THE COURT: Yes, I will overrule the objection.

MR. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to the growers in this territory. It would apply to anyone who asked me." (Tr. 269).

Specification of Error No. IX.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

"Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse?

MR. BENNETT: Just a moment; we make the same objection, and on the ground of it being hearsay testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

THE COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did." (Tr. 270).

Specification of Error No. X.

The Court erred in sustaining the plaintiffs' objections

to defendant's question and refusing to permit evidence to be introduced, as follows:

"Q. And did you at any time during your work for any companies other than Chatterton and Son ever make application for license to do business as a public warehouseman?

MR. WIGGENHORN: Object to that as immaterial.

THE COURT: Wasn't that stricken out of the pleadings, wasn't that set up in a separate and distinct answer that I sustained a motion to?

MR. WIGGNEHORN: That is correct.

THE COURT: Well, I will sustain the objection.

MR. BENNETT: Note an exception." (Tr. 270).

Specification of Error No. XII.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"RECROSS EXAMINATION

By MR. BENNETT:

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

MR. WIGGENHORN: I object to that as immaterial.

THE COURT: Sustain the objection.

MR. BENNETT: Note an exception.

THE COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

MR. BENNETT: Well, I believe, if I might show,

that this man will say that those were procured to file with the State of Montana." (Tr. 271).

Specification of Error No. XIV.

The Court erred in overruling the defendant's objection to plaintiff's question and in permitting the introduction of evidence as follows:

"Q. And did that in any way enter into your determination and conclusion to put the beans in that warehouse?

MR. BENNETT: Just a moment. That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

MR. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given.

THE COURT: I think so. Overrule the objection.

MR. BENNETT: Note an exception.

A. It did." (Tr. 273).

Specification of Error No. XV.

The Court erred in overruling the defendant's objection to plaintiff's question and in permitting the introduction of evidence as follows:

"WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(MR. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.

THE COURT: That may be understood; and it is overruled, and it is excepted to.)" (Tr. 274).

Specification of Error No. XVI.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

"My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

MR. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course?

MR. BENNETT: Yes.

THE COURT: All right." (Tr. 274).

Specification of Error No. XVIII.

The Court erred in sustaining the plaintiff's objection to defendant's question and refusing to permit evidence to be introduced, as follows:

"A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

MR. WIGGENHORN: Object to that as immaerial. "Warehouseman" was not the expression referred to.

THE COURT: Yes, sustained.

MR. BENNETT: Exception." (Tr. 276).

Specification of Error No. XXIII.

The Court erred in overruling defendant's Motion for Dismissal of the action, made at the end of plaintiffs' case, as follows:

"MR. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Maryland, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defendant; for failure to prove that the so-called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so-called action." (Tr. 281).

Specification of Error No. XXVI.

The Court erred in overruling defendant's Motion to Dismiss, made at the close of all the evidence, as follows:

"MR. BENNETT: If the Court please, at this time I would like to renew, for the purpose of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined." (Tr. 283).

Specification of Error No. XXVII.

The Court erred in holding and deciding that the plaintiff below could recover on the grounds that, if the said bond was not good as a statutory undertaking, it was good as a common law bond. (Tr. 284).

Specification of Error No. XXVIII.

The Court erred in deciding that this action could be brought in the name of the State of Montana. (Tr. 284).

Specification of Error No. XXIX.

The Court erred in holding and deciding that the defendant intended to insure beans when they used the form containing the word, "grain" in said bond. (Tr. 284).

Specification of Error No. XXX.

The Court erred in holding and deciding that the said bond should be reformed and the word, "beans" inserted therein in the place of the word, "grain". (Tr. 284).

Specification of Error No. XXXI.

That the evidence is insufficient to support the findings and conclusions of the District Court. (Tr. 284).

Specification of Error No. XXXII.

That the Court erred in failing to find that on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company of Maryland for a Public Warehouseman's bond to the State of Montana. (Tr. 284).

Specification of Error No. XXXIII.

That the Court erred in failing to find that on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain. (Tr. 285).

Specification of Error No. XXXIV.

That the Court erred in failing to find that at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana. (Tr. 285).

Specification of Error No. XXXV.

That the Court erred in failing to find that said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen. (Tr. 285).

Specification of Error No. XXXVI.

That the Court erred in failing to find that neither said bond nor any renewal thereof was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry thereof. (Tr. 286).

Specification of Error No. XXXVII.

That the Court erred in failing to find that no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued by the State of Montana, nor any department thereof, to said Chatterton & Son to engage in business as public warehousemen, as provided under the Statutes and laws

of said State of Montana, or for any other purpose or at all. (Tr. 286).

Specification of Error No. XXXVIII.

That the Court erred in failing to find that said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans. (Tr. 286).

Specification of Error No. XXXIX.

That the Court erred in failing to find that said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof. (Tr. 286).

Specification of Error No. XL.

That the Court erred in failing to find that there exists no basis for the plaintiff making claim under said bond. (Tr. 287).

Specification of Error No. XLI.

That the Court erred in failing to find that there exists no basis for a reformation of said bond. (Tr. 287).

Specification of Error No. XLII.

The Court erred in transferring this cause to the equity side of the docket. (Tr. 287).

Specification of Error No. XLIII.

The Court erred in finding that the general allegations of said Plaintiffs' Bill of Complaint were true. (Tr. 287).

Specification of Error No. XLIV.

The Court erred in ordering and granting judgment in favor of the plaintiff and against the defendant for the sum of Thirteen Thousand, One Hundred and no/100 Dol-

lars ($13,100.00), with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, when the said bond or undertaking sued on in this action is limited in the penal sum of Ten Thousand and no/100 Dollars ($10,000.00). (Tr. 287).

IV. ARGUMENT.

A. Filing Amended Complaint.

Specification of Error No. II.

We have previously shown that the loss of beans was complete and this action accrued July, 1931; that this action was begun in May, 1932, answer and reply filed, and the case was at issue on March 23rd, 1933. That on December 10th, 1934, or some fifteen months later, the Appellee (plaintiff below) asked leave to file its amended complaint.

It is apparent that the bond in controversy was issued under and pursuant to Sec. 3589 of the Revised Codes of Montana, 1921, which provided in paragraphs two and three thereof, as follows:

> "Each person, firm, corporation or association of persons operating any public warehouse or warehouses subject to the provisions of this Act, and every track-buyer, dealer, broker or commissionman, or person or association of persons, merchandising in grain shall, on or before the first day of July of each year, give a bond with good and sufficient sureties to be approved by the Commissioner of Agriculture to the State of Montana, in such sum as the Commissioner may require, conditioned upon the faithful performance of the acts and duties enjoined upon them by the law."
>
> "Every person or persons, firm, co-partnership, corporation, or association of persons, operating any public warehouse or warehouses, and every track-buy-

er, dealer, broker, commission man, person or association of persons merchandising grain in the State of Montana, shall, on or before the first day of July of each year, pay to the State Treasurer of Montana, a license fee in the sum of Fifteen ($15.00) Dollars for each and every warehouse, elevator, or other place, owned, conducted, or operated by such person or persons, firm, co-partnership, corporation or association of persons, where grain is received, stored and shipped, and upon the payment of such fee of Fifteen ($15.00) Dollars for each and every warehouse, elevator or other place where grain is merchandised within the State of Montana, the Commissioner of Agriculture shall issue to such person or persons, firm, co-partnership, corporation or association of persons, a license to engage in grain merchandising at the place designated within the State of Montana, for a period of one year. Any person, firm, association or corporation who shall engage in or carry on any business or occupation for which a license is required by this Act without first having procured a license therefor, or who shall continue to engage in or carry on any such business or occupation after such license has been revoked (save only that a public warehouseman shall be permitted to deliver grain previously stored with him), shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Twenty-five ($25.00) Dollars nor more than One Hundred ($100.00) Dollars, and each and every day that such business or occupation is so carried on or engaged in shall be a separate offense."

That it contemplated inspection of said public warehousemen, as shown by paragraph one thereof, as follows:

"On June 30th of each year every warehouseman shall make report, under oath to the Commissioner of Agriculture, on blanks or forms prepared by him, showing the total weight of each kind of grain re-

ceived and shipped from such warehouse licensed under the laws of Montana, and also the amount of outstanding storage receipts on said date, and a statement of the amount of grain on hand to cover the same. The Commissioner of Agriculture may also require special reports from such warehouseman at such times as the Commissioner may deem expedient. The Commissioner may cause every warehouse and business thereof and the mode of conducting the same to be inspected by his authorized agent, whenever deemed proper, and the books, accounts, records, paper and proceedings of every such warehouseman shall at all times during business hours be subject to such inspection. Any person, firm, or corporation, who shall knowingly falsify any of its reports to the Department of Agriculture, or who shall refuse or fail to make such reports when requested to do so by the Commissioner of Agriculture or his agents, or who shall refuse or resist inspection as provided in this section, shall be guilty of a misdemeanor and be punished by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars."

It will be remembered that demand had previously been made on Appellant by the Commissioner of Agriculture of the State of Montana and upon refusal to pay the penalty amount thereof this action was brought in the State Court under Section 3589.1, of the Revised Codes of Montana, which provides:

"Whenever any warehouseman, grain dealer, track buyer, broker, agent or commission man is found to be in a position where he cannot, or where there is a probability that he will not meet in full all storage obligations or other obligations resulting from the delivery of grain, it shall be the duty of the Department of Agriculture, through the Division of Grain Standards, to intervene in the interests of the holders of

warehouse receipts or other evidences of delivery of grain for which payment has not been made, and the Department of Agriculture shall have authority to do any and all things lawful and needful for the protection of the interests of the holders of warehouse receipts or other evidences of the delivery of grain for which payment has not been made, and when examination by the Department of Agriculture shall disclose that for any reason it is impossible for any warehouseman, grain dealer, track buyer, broker, agent or commission man to settle in full for all outstanding warehouse receipts or other evidences of delivery of grain for which payment has not been made, without having recourse upon the bond filed by said warehouseman, grain dealer, track buyer, broker, agent or commission man, it shall then be the duty of the Department of Agriculture for the use and benefit of holders of such unpaid warehouse receipts or other evidences of the delivery of grain for which payment has not been made, to demand payment of its undertaking by the surety upon the bond in such amount as may be necessary for full settlement of warehouse receipts or other evidences of delivery of grain for which pawment has not been made. It shall be the duty of the Attorney General or any County Attorney of this State to represent the Department of Agriculture in any necessary action against such bond when facts constituting grounds for action are laid before him by the Department of Agriculture."

That the cause was statutory in every respect is seen by a perusal of the original complaint. (Tr. 2).

In December, 1934, the attorneys evidently decided they couldn't sustain this action under the statute without a reformation, so they asked leave to file the so-called amended complaint, which was in reality a new cause of action, asking for "reformation *on grounds of mistake*" and com-

pletely abandoning the attempt to recover under the Statute, and to attempt recovery on the reformed instrument on the theory of a common law bond or undertaking.

In the Court's final decision (Tr. 259) the bond was reformed and recovery allowed on the basis of it being binding on the Appellant as said common law bond.

The original cause was based on the insolvency of Chatterton & Son in July, 1931, and that plaintiff and counsel were cognizant of all the facts constituting mistake, if there was any, is shown by the allegations of the original complaint, in which it was alleged that defendant knew of the exact nature and kind of business Chatterton & Son were engaged in and executed and issued the bond accordingly, and said counsel and plaintiff were apprised of the defense of defendant on the grounds of same being a "grain bond", rather than a bean bond, as early as the filing of the answer, to-wit, March 9th, 1933.

In the application to file the amended bill in equity, it is asked that said bond on which the original action is based be reformed to correspond with the intent of the parties and recovery thereon under said reformed instrument.

That plaintiff abandoned any attempt to state a cause under the Montana Warehouse Statutes is shown wherein, by Section II of said amended complaint, it is alleged with reference to the insolvent Chatterton & Son: "That said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana," while the original cause attempted to show a compliance

with the act, giving the State the right to sue on behalf of the warehouse receipt holders.

Under Article VIII, Sec. 28 of the Constitution of the State of Montana, it is provided:

> "Sec. 28. There shall be but one form of civil action, and law and equity may be administered in the same action."

Section 9033, subdivision 4, of the Revised Codes of Montana (1921 and 1935) provides:

> *"Two-year limitation. Within two years:*
>
> (4) An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Also, Sec. 9032, subdivision 1, of the Revised Codes of Montana, (1921 and 1935), provided:

> *"Within two years:*
>
> (2) An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state."

It is certain and must be conceded that Appellees knew all the facts governing the matter of mistake at the time they filed the original complaint in May, 1932,—so under Section 9033, the Statute of Limitations, they were barred from asking for this new relief.

(1) STATUTE OF LIMITATIONS.

The Appellant, in its arguments and objections to the filing of the amended complaint, showed to the Court below that an action for reformation is barred by the Statute of Limitations of the State of Montana. Appellees attempted to make the point that in equity the Statutes of

Limitation do not govern. As a general proposition, both in law and equity, in the Federal Courts the Statute of Limitations of the States are recognized and given effect, except in those cases when the same in equity might abrogate the Court's own principles or deny rights asserted under the Constitution or laws of the United States. Quoting from Hughes, Fed. Practice, Volume 7, Section 4132, we find the following:

> "In those States where the Statutes of Limitation are made applicable to suits in equity, as well as to actions at law, and in terms embrace the specific case, and in cases of concurrent jurisdiction, they have been held as obligatory, as such, upon the national courts of equity as upon the state court or as they are in actions at law, and the courts of equity should act in obedience, rather than upon analogy, to them; ***** In the application of the doctrine of laches, the Federal equity court usually acts, or refuses to act, in analogy to the state statute limiting actions at law of like character. ****
>
> In passing upon questions relating to property in the several States, the Federal courts of equity recognize the Statutes of Limitation and give them the construction and effect that are given by the local tribunals, and they consider equitable rights barred by the same limitations, ***** the law and decisions of the States as to the statute of limitations should be followed as to laches."

Citing a case from this Court, Norris vs. Haggin, 28 Fed. 275, affirmed 136 U. S. 386; 34 L. Ed. 424; also Higgins Oil Co. vs. Snow, 113 Fed. 433.

And in Cyclopedia of Federal Procedure, Volume 7, Section 3538, at page 390, it is stated:

> "'Where the reformation of a note is sought in

equity as a basis for the recovery of money paid thereunder, the fact that the recovery is barred by limitations is as effective in equity as at law."

Bank of U. S. vs. Daniel, 12 Pet. 32, 9 L. Ed. 989.

Counsel's statement that in the Federal Courts the Statute of Limitations is only considered in reference to laches is not correct, except in the cases where the Court is considering the question of laches they do turn to the Statute of Limitations in the States for guidance, *but in cases like the present, where there is a State Statute covering actions for reformation on the grounds of mistake, the Federal Court must follow the same.* An action for reformation in the State Court would be in the form of an equitable action, the same as in the Federal Court, so that it might be said that the Montana Statute of Limitations of two years on suits for reformation is an express limitation on a suit in equity and should be taken cognizance of by the Federal Court of that jurisdiction.

(2) RIGHT TO AMEND.

Rule 18 of the lower Court, relating to amendments of pleading, provides generally that the Court will follow the laws of the State at the time and place of application for leave to amend, and Sections 9186 and 9187 of the Revised Codes of 1921 covered the rights of amendment of pleadings under the Montana law, as follows:

"Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or twenty days after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have twenty days thereafter in which

to answer, reply, or demurrer to the amended pleading.''

It may be stated as a general proposition that ordinarily leave to amend is discretionary with the Courts and that they are lenient in granting same. But there is an exception to this rule, wherein the attempted amendment sets up a new cause of action under the guise of an amendment to the original cause, and especially where the new cause is barred by the Statute of Limitations. In such cases, when the above is clearly shown, there is no discretion allowed in the Court. Bancroft's Code pleading, Vol. 1, Section 523, page 757; 37 C. J. 1074, Section 511; Cyclopedia of Federal Procedure, Vol. 4, page 736, Section 1319.

A perusal of the authorities will show that there is no conflict as to the refusal to allow amendments when the above appears and the only conflict apparent is what constitutes a new cause of action. The Courts have laid down several tests for determining the application of the rule, i. e., whether a new cause of action is set forth, to-wit:

(1) Would a recovery had upon the original bar a recovery under the amended pleading?

(2) Would the same evidence support both of the pleadings?

(3) Is the measure of damages the same in each case?

(4) Are the allegations of each subject to the same defenses? See 37 C. J. page 1076, Section 512.

Taking the above tests and applying them to the proposed amended complaint, we answer the questions as follows:

(1) If the objector, the Fidelity and Deposit Company

of Maryland, should have won in the original action, to-wit, action on the Statutory Bond, that would not have foreclosed the plaintiff from asking for a reformation and seeking recovery on the reformed instrument, if said application for reformation was made within the period designated in the Statute of Limitations governing such action.

(2) It is apparent that an action for reformation on the grounds of mistake or fraud requires different and additional evidence from that required in an ordinary proceeding on contract, as originally set forth in this action.

(3) That the measure of damages is the same herein is because they ask for reformation only as to the type of bond, and not as to the amount.

(4) It is apparent that the allegations of the amended complaint are not subject to the same defenses as the original complaint, in that under the original cause of action the answer was based on the failure of plaintiff to come under the Statute sued upon, while under the proposed amended complaint it would require defendant to plead and prove lack of mistake or fraud and defend an action which is in the nature of an attempt to recover on a common law bond or agreement, as distinct from a Statutory obligation.

Under Section 513 of 37 C. J. at page 1077, another form of test is set forth, to-wit, a departure from law to law, stating, "Wherein original pleading declares especially on Statute for recovery an amendment based on common law liability introduces a new cause of action, subject to the Statute of Limitation," and asserting generally that Courts do not allow amendments when there is a departure

from law to law. Again we call the Court's attention to the fact that this is a departure from an original action brought at law for recovery under a particular Statute of the State of Montana, and that the proposed amended complaint departs in that this is a new cause in equity for reformation and a departure from specific recovery under the Statute to one under the common law.

This is not only a departure from law to law, but is a departure from fact to fact, as discussed under Section 514 of 37 C. J., page 1077, in that under the original cause the facts involved were, (a) whether or not plaintiff complied with the Statute to such an extent that the defendant is bound under same; (b) whether or not the bond written was a grain bond, as prescribed under said Statute. Under the amended complaint the action is based on the fact as to whether or not defendant wrote a grain bond when they intended to write a bean bond, and whether or not they are not liable under the same by reason of the fact that they wrote said bond and the bean holders relied on same, regardless of whether or not there was any compliance with the Statute or whether or not Chatterton & Son, the warehousemen, ever complied with the Statutes of the State of Montana, qualifying them to operate a warehouse in said State.

It would seem that under any view of this proposed amended complaint it was an attempt to state a new, separate and independent cause of action from that in the original complaint, and that the action would have been brought as a new cause of action if same was not barred under and

pursuant to Section 9033 of the Revised Codes of Montana, 1921.

It is also apparent that this was an attempt to state a new cause of action some two years and seven months after the original action was started, and one month short of two years after this cause was at issue.

Even equity does not favor amendment of bill—so as to introduce new matter and entirely change the purpose of the suit. Hughes Federal Practice, Vol. 7, Sec. 4413.

In the case of Shields vs. Barrow, 58 U. S. (17 How.) 130 - 15 L. Ed. 158, there was an attempt to change the bill from recession to one for specific performance. The Court said:

> "'Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the Vice-Chancellor, in Verplank v. The Mercantile Ins. Co., 1 Edwards, Ch. 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See also, the authorities there referred to, and Story's Eq. Pl. 884.
>
> We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this; though doubtless much liberality should be shown in

acting within it, taking care always to protect the rights of the opposite party.

See Mavor v. Dry, 2 Sim. & Stu. 113.

To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew.

To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject."

U. S. vs. Whitted—245 Fed. 629.

Nor could plaintiffs below have declared that this was merely in the nature of a supplemental bill, because a bill called a supplemental bill, but which is in effect a new proceeding, does not operate to prevent the effect of the Statute of Limitations.

White vs. Joyce, 158 U. S. 128; 39 L. Ed. 921.

"Therefore where the amendment introduces a new claim not before asserted, it is not treated as relating back to the beginning of the action, so as to stop the running of the Statute, but is the equivalent of a fresh suit upon a different cause of action and the Statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction."

17 R. C. L. 816, Sec. 181-182.

The reformation is the main relief and prerequisite to enforcement. The fact that plaintiff, in its amended complaint, asks for reformation and enforcement in the same cause does not help as far as the Statute of Limitations is concerned, in that the main and necessary relief prerequisite to anything else must be the reformation. Sec. 153 of

Vol. 53 C. J. on page 1002, discusses this as follows:

> "Where reformation and enforcement are sought in the same proceedings, there is authority to the effect that a rule elsewhere enforced that an action for reformation of the contract is not barred so long as the action on the contract itself is not barred, is inoperative where the reformation *is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief,* and that the limitations applicable to a proceeding purely for reformation is to be employed and an extension until such time as action on the contract would be barred is not proper." (Italics ours).

In the case of Bradbury vs. Higginson (Cal.) 140 Pac. 254, passing on the point of limitations of actions when the reformation is *not merely incidental* to the relief asked, the Court said:

> "(5) The opinion in the Gardner case contains, further, an expression to the effect that an action for the reformation of a contract is not barred so long as an action on the contract itself might be brought. If this be the correct rule, we do not consider it applicable to a case like the one before us, where the reformation is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief.
>
> For the reasons stated, we conclude that the demurrer to the answer was rightly sustained."

(3) WHAT FORM OF ACTION WAS PLAINTIFF ATTEMPTING TO STATE UNDER THE AMENDED COMPLAINT

Counsel wishes to call the attention of the Court that in Montana there are at present three acts dealing with warehousemen:-

(1) Sec. 3589, as amended by Chapter 41, Session Laws of Montana, 1923, dealing with grain warehousemen: Sec. 3589 A, being the section providing for the intervention of the Department of Agriculture in suits on behalf of receipt holders. From the title of the original complaint, "State of Montana, et al, for the use and benefit of the holders of warehouse receipts in the public warehouse seed grain elevator", it would seem plaintiff was pursuing his remedy under this section.

(2) Sec. 3592.1 — 3592.2, Revised Codes of Montana, 1921, being amended by Chapter 50, Session Laws of Montana, 1927, provides for the licensing and bonding of warehousemen dealing in "agricultural seeds." This amendment carries no provision, however, for the intervention of the State of Montana through its Department of Agriculture, and it would be presumable that plaintiff could not attempt to proceed under this Act.

(3) In March, 1933, nearly a year after this action was begun, the Montana Legislature (Chapt. 55, Session Laws, 1933) passed an Act dealing exclusively with *bean* warehousemen, which provides for an action by and through the State, as in the original grain Act.

Any attempt to amend in order to transfer the cause of action from (1) above to Act designated (2) and/or (3) would be met by the objections that same being pursuant to an entirely different and distinct statute, is barred by the Montana two year limitation relating to statutory actions. 9032 Revised Codes of Montana, 1921, Sec. 1, as follows:

"1. An action upon a statute for a penalty or for-

feiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

9033, Revised Codes of Montana, 1921, Sec. 1, as follows:

"1. An action upon a liability created by statute other than a penalty or forfeiture."

Of course, it would hardly appear that plaintiff was attempting to pursue an action under (3) above, since the Act was not in existence at the time the cause arose.

Then the question arises, if plaintiff below had abandoned all attempts to proceed under any of the above statutory remedies, just why was this action prosecuted by the State of Montana?

Regardless of how we look at the new pleading, it was a separate, new and distinct cause of action.

The cases so generally upheld the objections of Appellant to the amended complaint of Appellees that it would seem unnecessary to discuss the question.

See, however:

Melvin vs. Hagadorn, 127 N.W. 139;
Union Pac. Ry. Co. vs. Wyler, 39 L. Ed. 983, 158 U. S. 285;
Boston & N.R. Ry. Co. vs. D'Almedo, 108 N.E. 1065;
U. S. vs. Salem, 244 Fed. 296;
Land Co. of New Mexico vs. Elkins, 20 Fed. 545;
Bird vs. Grapnell, 102 S.E. 131;
Scholle vs. Finnell, 159 Pac. 1179;
Grenfell Lumber Co. vs. Peck, 155 Pac. 1012;
Koch vs. Wilcoxson, 158 Pac. 1048;
Webber vs. Phister, 197 Pac. 765;
Christian vs. Ross, 88 S.E. 986;
Bryson vs. Monaghan, 124 S.E. 167;
Martin vs. Palmer, 104 S.E. 308;

Peiser vs. Griffin, 57 Pac. 690.

Below, counsel for plaintiff laid much stress on Section 274 A of the Judicial Code (28 U.S.C.A. 397) known as the Conformity Act, also Equity Rule 22, relating to amendments and transfer of causes to conform with *proper practice.*

Appellant has no dispute with the general proposition so set forth therein, allowing amendments and transfer *"to obviate the objection that a suit was not brought on the right side of the court."*

If Appellees were entitled to equitable relief, the fact that it brought its action at law should not bar it, no more in the Federal Court than in the State of Montana, where the distinction between law and equitable relief is abolished, but we do not believe these Conformity Acts, or any others cited, or which could be cited by counsel, goes to the proposition where there is involved the pleading of *an entirely new cause of action,* even under the Conformity Act.

In the case of Proctor & Gamble Co. vs. Powelson, 288 Fed. 299, refusing to allow a similar amendment, wherein it was attempted to change from an action of recision to a partnership accounting, the Court, on page 307, said:

> "The purpose of section 274a was to obviate a new action or suit merely because the litigant had brought his suit on the wrong side of the court. This section did not mean to confer the power upon the court of transferring the cause from law to equity or equity to law, as the case might be, *where so to do would require setting up an entirely different cause of action and supporting the same by an entirely different character and subject-matter of proof. The words "to conform them to the proper practice" are significant, because*

they indicate that Congress was dealing with a practice question, and what the Congress was endeavoring to accomplish was the avoidance of a second trial where the cause of action set up, the testimony adduced in support thereof, and the relief sought indicated that the action or suit had been brought on the wrong side of the court; *but we are satisfied that this useful and remedial statute was not intended to empower the Court to transfer the cause, where in order to bring it into the law or equity side, as the case might be, it would be necessary to plead an entirely different cause of action, supported by testimony wholly or in part different, and where the judgment or decree to be obtained would thus rest upon entirely different pleadings and substantially different testimony.'' (Italics ours).*

See also Massachusetts Mutual Life Ins. Co. vs. Hess, 57 Fed. (2nd) 884.

America Land Co. vs. City of Keene, 41 Fed. (2nd) 485, where the court refused right to amend to show fraud where the original complaint was to enjoin the enforcement of an ordinance.

American Mills Co. vs. Hoffman, 275 Fed. 285.

Counsel will counter with the proposition ''but we are not changing the cause of action!'' The court will remember that counsel wanted to escape, if possible, from the proposition that originally the action was brought under the Grain Warehousemans Act of the State of Montana, which, after all, is the only Act under which the form of procedure was admissible.

They are in the same category as plaintiff in the case of Kuhlman vs. W. & A. Fletcher Co., 20 Fed. (2nd) 465, where, under the Conformity Act, it was attempted to

slip from a tort on the law side to a cause in admiralty, wherein the Court said, on page 467:

> "Which of the two remedies did the plaintiff invoke in this case? Certainly it was not by libel in admiralty, for it was into a court of admiralty he strove to enter by amending the pleadings he had filed in a court of law. Did he elect the action at law afforded him by the Merchant Marine Act of 1920 and institute it on the law side of the District Court? *Although he made no formal or verbal election, we think he made one nevertheless; and for these reasons: First, he entitled his suit in that court; and second, consciously or not, he pleaded the statute in pleading his case. Distinguishing between counting on a statute and reciting a statute (as these words are familiarly known to pleaders), he, nevertheless, pleaded the statute by stating his case within its terms, though without mentioning it.* Gould's Pl. Ch. 3, Sec. 16, note 3. When the facts as pleaded brought the case within the statute, the statute is invoked without referring to it. Luckenbach S. S. Co. v. Campbell (C. C. A. 9th) 8 F. (2d) 223, 224; and when a seaman invokes the statute by a suit at law pleaded within its erms, the election required by the statute is made by instituting the suit. Hammond Lumber Co. v. Sandin (C. C. A. 9th) 17 F. (2d) 760, 762. Having thus elected the statutory remedy by instituting the suit at law, the plaintiff had no right later to amend his pleadings and transfer his action from the law side of the court to its admiralty side. He was bound by his election. For this reason the trial court committed no error in refusing him leave to amend his complaint." (Italics ours).

Here too, either consciously or not, plaintiff below made its election under 3589-A of the Revised Codes of Montana, 1921, referring to insolvent grain warehousemen and

the intervention by the Department of Agriculture of the State of Montana.

The amended complaint abandoned this action to pursue a remedy as on a common law undertaking after reformation of the bond. It attempted to bring an independent action in equity to reform a bond so as to indemnify against the loss of beans instead of grain. There was no provision in Montana covering bean warehousemen at that time, so plaintiff below amended the whole complaint to bring it in line with the theory of a common law bond, all irrespective of whether the bond was ever filed with the State or ever required to be.

Appellees admit by paragraph II of the amended complaint that Chatterton & Son never qualified to do business in the State of Montana so that, instead of proceeding under the theory of compliance, plaintiff states what, (1) bond intended to cover beans, (2) was entered into voluntarily, on a valid consideration.

In conclusion of this part of the argument, it must be observed that plaintiff below changed its whole theory and cause of action, in that this action was originally brought under the *Public Warehousemens' Act* by the Department of Agriculture under the Sections of the Revised Codes of Montana, to-wit, 3555 to 3649, and the rights of the Department of Agriculture thereunder. The attempt by plaintiff to reform the bond must necessarily have meant that it abandoned its former cause of action.

We call the attention of the Court to Section 3574, Revised Codes of Montana, 1921, of this Act, which is determinative, wherein we find the following:

"Definition of terms. The term "public warehouse" includes any elevator, mill, warehouse, or structure in which *grain* is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier. The term "public warehouseman" shall be held to mean and include every person, association, firm and corporation owning, controlling or operating any public warehouse in which grain is stored or handled in such a manner that the grain of various owners is mixed together, and the *identity of the different lots or parcels is not preserved.*" (Italics ours).

This was amended in 1929 by the addition of the following:

"Whenever the word "grain" is mentioned in this Act it shall be construed to include flax."

That is the only major change made in this, and it was not until 1933 that we had a specific Act dealing with beans. If we read the above in connection with Section 3573 of the Revised Codes of Montana, 1921, as follows:

"The division of grain standards and marketing. The Department of Agriculture, Labor and Industry, through the Division of Grain Standards and Marketing, shall enforce all the laws of the State of Montana concerning the handling, weighing, grading, inspection, storage and marketing of grain, and the management of *public warehouses.*"

it will be seen that, unless the word "grain" included beans, then the plaintiff in this case had no right of action under and pursuant to the Statutes of the State of Montana through the Department of Agriculture, as this case was begun. It is impossible to arrive at any other conclusion than that plaintiff below felt that grain did not

include beans and that it must abandon any attempt to proceed under the Statutes governing an action of this character, and must necessarily attempt a reformation of this bond from the "Public Warehousemens' Bond" under which application was made by plaintiff, and under which this bond was written, and attempt to recover merely on the contract itself as a common law obligation, separate and distinct from any statutory right as originally set forth.

B. FAILURE TO SUSTAIN MOTIONS TO DISMISS AND OBJECTION TO INTRODUCTION OF EVIDENCE

Specification of Error No. III.

Specification of Error No. V.

Most of the grounds urged by Appellant under the previous heading relative to the amending of the complaint are applicable here, but in addition, there are other questions raised for the first time by the motion to dismiss, and later, by objections to introduction of evidence, which are here consolidated for discussion.

(1) CHATTERTON & SON ARE INDISPENSABLE PARTIES.

In order for Appellees to reform this instrument involved in the action, it was necessary to join Chatterton & Son, the obligor, as said Chaterton & Son are indispensable parties to this action. This point is specifically raised in paragraphs V and VII of the Motion to Dismiss. (Tr. 67). In 53 Corpus Juris, 1005, dealing with reformation of instruments, it is stated:

"*In a suit to reform contract of suretyship the prin-*

cipal obligor is a necessary party to an action for reformation.'' (Italics ours).

Several cases are cited in support of that doctrine and there is nothing therein shown to the contrary. The reasoning given is absolutely sound, and was certainly binding on the lower Court in this action, namely, that because of the surety's right to subrogation against the principal in case of a recovery against them on their secondary liability, the Court should do nothing which will affect the rights of the parties among themselves without having all of the parties who signed the bond before it in the cause. In fact, the above is almost the exact quotation from State vs. Kronstadt, (Iowa), 216 N.W. 707. In this case Appellees have failed to make Chatterton & Son, the principal under the bond, a party, plaintiff or defendant, and still allege that *the mistake was between the principal and surety,* and asked the Court to determine that such was the case and that the bond be reformed to conform with the intentions of the parties, which would, in effect, fix the judgment against the principal under the matter of subrogation to the Appellant.

What right had the State of Montana to bring a suit to reform this bond, when there is no allegation that the State, itself, made any mistake in connection with the bond or that there was any agreement with the State, or any of its representatives, that the warehouse bond should be executed, nor is there any claim that the State relied upon the fact that the bond, as executed, was intended to cover a bean warehouse and issue a license covering such bean warehouse?

The above would seem to apply to the owners of the beans, for whose benefit the suit is brought, and especially when the State of Montana asks for a reformation based on the allegations that there was a mistake between the principal obligor and the surety, and asks that the contract be reformed without having both of the parties to the contract before the Court.

(2) FAILURE OF COMPLAINT GENERALLY TO STATE CAUSE OF ACTION ON BOND.

The amended complaint filed by plaintiffs below failed to show that there was ever a compliance with the State statutes of Montana in reference to a statutory bond, although the suit was based on said bond. In fact, in paragraph II and paragraph VII it was expressly alleged that the said corporation, Chatterton & Son, had never qualified to do business in the State of Montana. In other words, there was no allegation showing that the original bond and the renewal thereof was approved by the Commissioner, nor was a license issued upon the strength of the said bond prior to the time any of the owners of the beans placed their beans in the warehouse, or at any other time or at all.

In 9 Corpus Juris, at page 16, it is stated:

> "As a general rule, a bond is not perfected until delivery thereof, and therefore delivery is essential to its validity, and it takes effect from that date. But in case of a statutory bond, the approval and filing takes the place of delivery."

In this case the bond was for the purpose of securing a license to do business, and was one of the requisites to doing business in the State, and when plaintiffs below set

forth that Chatterton & Son never qualified to do business in the State, they were correct in that Chatterton & Son never filed their bond and were never licensed to do business as bean warehousemen, grain warehousemen, or public warehousemen of any kind or character.

In paragraph X of the amended complaint (Tr. 61), plaintiffs below attempted to plead that the bond finally came into the hands of the Department of Agriculture, Labor and Industry, of the State of Montana, but there is no showing *WHEN OR BY WHOM THE SAME WAS DELIVERED, OR HOW SAID BOND EVER CAME INTO THE POSSESSION OF THE STATE.*

In 9 Corpus Juris, at page 17, it is stated:

> "A bond must be delivered by the party whose bond it is, or by his agent or attorney. Where a bond is signed and sealed but not delivered to the obligee, and it is afterward put into his possession by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument; if the possession is secured wrongfully, accidentally, or inadvertently, the instrument will be held never to have taken effect."

And on page 18, of the same Volume, it is stated:

> "Every bond, in order that it may be a binding obligation, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If, for any reason, an obligee in a bond refuses to accept it, the bond does not become operative, and no liability on the part of the maker thereunder arises. *Statutory or official bonds made payable to the state cannot become effective until they are accepted by those duly authorized to accept them.*" (Italics ours).

The plaintiffs were required to plead and prove the bond

was delivered by the defendant, or some other agent, and that the same was received and accepted by those duly authorized to receive and accept the same, prior to their doing business, under which liability is claimed, and unless they did so there was no cause of action stated. A bond of the character herein sued upon is only liable for acts occurring after the conditions precedent under the Statute, such as the issuance of a permit, etc., have been fulfilled. In the case of State vs. Diebert (So. Dak.) 240 N.W. 332, grain had been delivered to a warehouse prior to the time a permit to operate a public warehouse had been executed by the Department. Receipts were given for the grain, but not regular warehouse receipts. Subsequently a permit was issued by the Department and the warehousemen then issued regular warehouse receipts to the owners of the grain. It appeared that the grain had disappeared from the warehouse prior to the time the permit was issued and the owners of the grain brought suit in the name of the State on the bond and recovered in the lower Court. The Supreme Court of South Dakota reversed the case and held that the bond was only liable for acts occurring after the issuance of the permit.

Another case which is helpful on the question herein considered is American Surety Company vs. State (Tex.) 277 S.W. 790. See also 67 Corpus Juris, page 461.

Of course, the argument above raised for the first time on demurrer, and later at beginning of the trial, arises all through the case and will be covered more fully by subsequent discussions herein.

C. ERROR OF COURT STRIKING APPELLANT'S AFFIRMATIVE DEFENSE.

Specification of Error No. IV.
Specification of Error No. X.
Specification of Error No. XI.
Specification of Error No. XII.

The lower Court, by its order of December 30th, 1935, (Tr. 106) ordered its affirmative defenses stricken as not constituting defenses to the amended complaint (Tr. 88-101), and subsequently sustained objections which tended to prove them,—thus we are discussing here the cause, being Specification of Error IV (Tr. 266) and part of the effect, (Specifications of Error X, XI and XII, Tr. 270, 271 and 272).

The defenses set up the history of the bonds, the purpose for which given, to-wit, to qualify Chatterton & Son to do business as public warehousemen in the State of Montana under the Statutes of that State. The failure in delivery of said bond, licensing Chatterton & Son, and general failure of conditions precedent to making it a valid obligation, either in law or equity.

The Court allowed R. J. Healow, Agent for Chatterton & Son, a witness for plaintiff below, to testify as follows:

> "A bond was obtained for this warehouse conducted here by me. Soon after I became manager over here, I asked the Lansing office to procure a bond for the protection of the growers. That would be in the fall of 1929. The bond was issued in the early winter of 1930, about January. Plaintiff's "Exhibit 2" is the bond I now refer to. After taking the managership, I requested the Lansing office to procure a bond. *I had for years previously always operated under a bond, and they replied that they would get it.* That

was the last I heard of it for a long time. Of course, in discussing with them many times from Kansas City and occasionally from Michigan, they maintained that they would or did secure a bond as requested.

The bond came into my possession here at the Billings office some time during the winter or spring of 1930. That bond ran to July, 1930. Plaintiff's "Exhibit 3", which purports to be a continuation certificate of the same bonding company, continuing that bond in force for a year from July 1930 to July 1931, came into my possession shortly after the date that it bears, July 30.

Neither of these instruments was promptly filed with the Commissioner of Agriculture. The only explanation I have for this is that the bonding and business of that nature was conducted from the Lansing office, and I do not recollect of having any reason for them being returned to our office here." (Tr. 131). (Italics ours).

Then the Court, giving as a reason that the matter was previously stricken from the answer, refused to allow Appellant to go into the same matter allowed on direct, when said witness for plaintiff said, "I had for years previously always operated under a bond," and show how and for what purpose he had always gotten said bonds and why he had asked for this one, namely, to qualify as a licensed warehouseman under the laws of the State of Montana.

We believe it was vital to our case to show that he was an experienced man in qualifying under the State laws, that when he first came to Montana he so intended, but when he found *bean warehouses* did not have to come under the confining influences of the Department of Agriculture and State of Montana, he merely tucked the bond

away in his files and decided to forget about it, as is shown by his replies to the Department (Defendant's Exhibits 19 and 20) (Tr. 146 and 148) to inquiries from said Department (Defendant's Exhibits 21 and 22) (Tr. 149 and 150).

Appellant feels that under its pleading and proof it was entitled to show that from wording and intent this bond was a statutory bond. Counsel for plaintiff, we believe, were in the position where they had to concede that, unless the bond could be construed as a common-law-bond, they had no standing in Court.

Why then, should the Court arbitrarily hold at the outset that the obligation was a common-law undertaking and deprive the Appellant of its right to defend?

D. ADMISSION OF STATEMENTS MADE BY AGENT OF CHATTERTON & SON.

Specifications of Error Nos. VIII, IX, XIV, XV and XVI.

Because of their interrelation, the above specifications are taken together.

Under the theory that the bond was a common-law bond, and to attempt to show consideration, the lower Court allowed plaintiffs' witness, Healow, below, to testify that he represented by statements to bean depositors that they were bonded warehousemen (Tr. 269-270). There was no attempt to show that these statements were ever made in the presence of or communicated to the defendant.

Chatterton & Sons were not parties to this suit, and what their agents said or did was clearly hearsay as far as this Appellant was concerned.

The Court, however, repeatedly failed to allow Appellant to bring out from this witness, as shown above, the fact

that Healow knew what a bonded warehouse meant and knew at this very time that they were not bonded, that he failed to file the bond or comply with the Statute of the State when he, from long experience, knew otherwise and was, at the very time, acting in disregard of the rights of everyone concerned.

The above was followed, however, by allowing certain bean depositors, over objection of Appellant, to testify that they acted on such representation and that is why they so deposited the beans.

Still mindful of the rules of evidence in an action tried to the Court, we submit that we do not know how the Court came to its conclusions, except on objectionable testimony.

E. FINDINGS AND CONCLUSIONS OF COURT.

Specifications of Error Nos. XXVI to XLIII, inclusive.

Appellant believes that Appellant's motion to dismiss at the close of the case and objections to findings and conclusions of the Court may more properly be taken up here together.

H. E. Chatterton, President of Chatterton & Son, the principal, testified, "Whenever the States did require bonds, we took them out", (Tr. 200) and when Healow took charge of the Billings branch of that company, he assumed a bond was required by the State of Montana and proceeded to get one (Tr. 131).

H. E. Chatterton, back at Lansing, made application to Appellant's agents for a public warehouseman's bond to qualify in Montana; Austin Jenison, agent for Appellant at Lansing, Michigan, testified he did not know the opera-

tions were limited to "beans" in Montana and assumed they handled "grain", and there was no mistake on his part in the form of bond applied for or executed. This positive testimony is not contradicted, except inferentially where H. E. Chatterton testified as to the close friendship existing between the officers of his company and Mr. Jenison, from which association, social and business, he concludes Mr. Jenison must have known of their general business in Montana and elsewhere (Tr. 190-191).

It is apparent from the evidence that Healow subsequently determined the bean storage business did not come under the jurisdiction of the State (Tr. 146) and did nothing further to become licensed as a public warehouse.

Appellees contend that a bond or undertaking of this kind should be construed most strongly against the Appellant, but this Honorable Court has held otherwise and said *same must be strictly construed in favor of the obligors* in the case of McGrath vs. Nolan (Circuit Court, 9th Circuit, May 5, 1936) 83 Fed. (2d) 746, where the Court, on 751, said:

> "Here is an ambiguity which must be resolved in favor of the surety in keeping with the rule that surety contracts, particularly those required by statute, are to be strictly construed in favor of the obligors. Leggett v. Humphreys, 21 How. 66, 75, 16 L. Ed. 50; Commercial Nat. Bank of Washington v. London & Lancashire Indemnity Co., 56 App. D.C. 76, 10 F. (2d) 641, 642; Moody v. McGee (C.C.A.) 41 F. (2d) 515; State ex rel. Hagquist v. United States Fidelity & Guaranty Co., 125 Or. 13, 21, 265 P. 775."

The lower Court has in its final decision attempted to take a dual position—to uphold it partially as a valid statu-

tory obligation and, on the other hand, reform it and construe it aside from statutory provisions as a common-law undertaking. It can't be both—and any attempt to construe it as *a valid private agreement between the parties to this suit* is, to say the least, strained.

The undertaking was not given in pursuance *of any agreement between the parties, but simply to secure a statutory privilege.* It did not have that effect and was therefore wholly without consideration and void and could not be valid as a common-law undertaking.

Powers vs. Chabot, (Cal.) 28 Pac. 1070;
See also—National Surety Co. vs. Craig, (Okla.) 220 Pac. 943;
Halsted vs. First Sav. Bank, (Cal.) 160 Pac. 1075.

A bond, given as a statutory bond, cannot be considered as a common-law obligation.

Republic Iron & Steel Co. vs. Patillo (Cal.) 125 Pac. 923.

It is contended that the bond in question may be considered as a voluntary common-law bond, given without any reference to the Statute. Whether, in any case, it could be supposed that a sane man, not fearing the compulsion of the Statute, would voluntarily give such a bond as is described in Section 1203, running to nobody and enforceable by anybody who, in the future, could bring himself within its range, is a question not here presented. In the case at bar, it is expressly stated on the face of the bond that it is given in compliance with Section 1203.

Shaugnnessy vs. American Surety Co., 71 Pac. 701.

The salient points of this case, and the ones that Appellant believes are decisive, are:

(I) That said bond in controversy was executed with intent to and did cover the storage and handling of grain, as distinguished from beans.

(II) That said bond was intended as a statutory bond and contemplated the filing and approval of said bond and the licensing and supervision of Chatterton & Son by the State of Montana, and the facts disclose that said bond was not approved or filed and said Chatterton & Son never licensed by the State of Montana, nor any Department thereof.

(III) That there exists no basis for a reformation of said bond under the law or facts.

(IV) That there exists no basis whatever for the plaintiff making claim under said bond.

(V) No date of conversion of the beans has been fixed within the effective date of the undertaking.

BOND COVERS PUBLIC WAREHOUSEMEN IN STATE OF MONTANA TO INDEMNIFY THE OWNERS OF GRAIN STORED IN WAREHOUSE.

We do not believe that the following facts can be disputed in this case:

(A) That the application made by Chatterton & Son and signed by the officers in Lansing, Michigan, was for a "Public Warehousemen's Bond" to State of Montana.

(B) That the bond written, by its terms, was a Public Warehouseman's Bond to indemnify the owners of *grain* stored in said warehouse.

(C) That said bond was to qualify them as public warehousemen under the law of Montana and that the Commis-

sioner of Agriculture never licensed Chatterton & Son as warehousemen in the State of Montana.

(D) That said bond was never filed with the State and came into their possession a year after it expired by its terms.

(E) That the renewal certificate was never filed and came into possession of the Department of Agriculture about July 21st, or twenty-one days after it expired by its terms, and after the loss of beans occurred.

The Montana statute, Section 3574 Revised Codes of 1921, uses the language:

> "The term 'public warehouse' includes any elevator, mill, warehouse or structure in which grain is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier."

This Section was amended by the Laws of 1929, page 304, to read:

> "Section 3574. Whenever the word 'grain' is mentioned in this Act, it shall be construed to include flax. The term 'public warehouse' includes any elevator, mill, warehouse or structure in which grain is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier."

Section 3589 of the Codes of 1921 provides for the giving of bond by persons operating a public warehouse subject to the Act. The Act referred to is Chapter 216 of the Session Laws of 1921, in which this grain warehouse legislation first appears. (Appendix, Page 5..).

Chapter 12 of the Laws of 1913, found as Section 3591 of the Codes of 1921, deals with "agricultural seeds", defining them. It makes no reference whatever to public warehouse. (Appendix, Page 8..).

Chapter 50 of the Session Laws of 1927 is the first time the warehousing of agricultural seed is dealt with, and there, in Section 4, the term "agricultural seed" is re-defined, in effect amending Section 3593 of the Codes of 1921, and this is added to the definition:

> "beans, peas and registered or certified seed grains in bags."

And by Section 8 of the Act of 1927 it is provided:

> "None of the provisions of this Act shall be construed as requiring an additional license from a public warehouseman or other person, corporation or association who is licensed to handle or store grain, but if any person, firm, copartnership, corporation or association holding a license to handle or store grain shall also choose to engage in the business of storing any agricultural seed for the public it shall be necessary to furnish such additional bond as the Commissioner of Agriculture shall determine, and in the storage of such agricultural seed such person, firm, copartnership, corporation or association shall be subject to the terms and conditions of this Act."

In our humble opinion the Montana statutes distinguish between "grain" and "beans", and that this bond here in question by its terms is to "indemnify the owners of grain stored in said warehouse", and that the storing of beans, as agricultural seed or otherwise, is not within the contemplation of this bond construed in the light of the Montana statutes.

Additionally, the bond runs to the State of Montana.

The State of Montana has suffered no loss. The State of Montana has no right to assert a loss on behalf of its citizens, except as provided by law. The law provides for the bonding of such warehousemen as the State licenses, and we think it is a condition precedent to the State's right to sue on the bond that the bond be given in connection with a license issued by the State. The bondsmen entered into the contract contemplating State license and supervision, and we don't think the State can omit or fail to license or supervise and then claim under the bond.

For the Court to construe the bond in such a manner as to hold the defendant responsible, regardless of the failure to license or supervise said Chatterton & Son, according to the intent and terms of the bond, is to enlarge the responsibility and liability under this bond far beyond the intent of same.

Counsel for plaintiff practically abandoned any hope of recovery on this bond, except that the same be construed as a common law bond. To do this, of course, means that he asked the Court to make a new contract for the sureties and change the character of the contract and increase their liability. The Court, in the case of Conant vs. Newton, 126 Mass. at 110, said:

> "In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the

rules and practice of that Court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability."

In the case of Kuhl vs. Chamberlain, similar to the one herein, 118 N.W. 776, at 777 and 778, the Court said:

"1. Counsel for plaintiff frankly concede that, unless this bond can be construed as a common-law bond, and not as a statutory bond, they have no standing in Court. They concede that, if the bond is to be deemed a statutory bond, defendants' contention must prevail. They argue, however, that it is not a statutory bond; that it does not purport to be such; that there is no such office as county depository, and the reference thereto contained in the bond must be deemed nugatory, and the bond must be enforced according to its plain terms in other respects; that the plaintiff is the obligee in the bond, and on the faith of it he deposited moneys with the Exchange Bank; and that he is now personally entitled to the indemnity provided for."

****

"It is alleged in the argument that the sureties were in no manner hurt by treating the bond as a common-law bond rather than a statutory bond, and that their undertaking was the same in either case, in that they would have been liable for just as much under a statutory bond as on a common-law bond. If this were so, it would not authorize the Court to make a new contract for the surety. Nor are we ready to assent to the ground of the argument. As a statutory bond, the maximum limit of liability of the defendants would be $2,000. Without discussing the question of whether the sureties had a right to be influenced in lending their suretyship by the supposed fact that the

Board of Supervisors would permit only solvent banks to be selected, *there is much to be said for the proposition that a surety might rely upon the judgment of the Board of Supervisors in such cases.''* (Italics ours).

It is apparent from a reading of these authorities that sureties have a right, in writing a bond of the character herein, to rely on the conditions upon which the bond was executed, to-wit, that it was to authorize them to do business in the State of Montana as public warehousemen, which bond was to be filed with the proper authorities, and that it contemplated licensing and supervision of said Chatterton & Son, which would certainly be a different proposition than agreeing to pay the private debts of Chatterton & Son. The Court will note from the pleadings of plaintiff herein that they allege specifically that *neither Chatterton & Son or Chatterton & Son, Inc.,* ever qualified to do business in the State of Montana as a corporation or otherwise, much less licensed to do business as public warehousemen in said State.

Since this contract is restricted in its terms and on its face as a contract to the State of Montana for a certain purpose and on certain conditions precedent, this cannot be construed by the Court as a common-law obligation or a voluntary bond of any character. (13 C. J., 524).

''Restriction to Terms of Contract. The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where un-ambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its

meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

Court cannot make new contract. It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain."

BOND

TO THE STATE OF MONTANA.

This bond ran to the State of Montana for a certain purpose and delivery and acceptance was necessary to its validity.

Stearns on Suretyship (3rd Edition) page 194, has this to say:

"123. Delivery and acceptance are necessary to the Validity of a Bond.

A bond cannot take effect until delivered and accepted by the obligee. To constitute a delivery there must either be an actual manual passing of the instrument to the obligee, or to someone authorized to receive it for him, or such a disposition of it by the obligor as precludes him from further control over the bond. Such delivery must be without condition, and where a bond is put in possession of the obligee, with the stipulation it is not to take effect except upon condition, it does not become a legal delivery, and binding upon the surety, until such condition is fulfilled."

The bond herein, especially, comes within the above because it was delivered to the principal, Chatterton & Son, with the condition attached, expressed on its face, of the securing of a license to do business under the laws of Montana. *The bond was conditionally executed,* which condition was *shown on the face.* (Dair vs. United States, 16 Wall 1, 21 L. Ed. 491).

And on the question of consideration, the bond was executed dependent upon the matter of becoming a licensed warehouseman in and under the State of Montana—one depended on the other.

Stearns on Suretyship, page 198.

> "The main contract which the bond secures furnishes a consideration for the bond, where the one depends upon the other, such as where the obligee agrees to make a contract with the principal upon the condiiton that the latter will furnish a bond, or where a contract of employment is tendered upon the condition that the employee will give a bond."

In Keith County vs. Ogalalla Power & Irrigation Co., 89 N.W. page 375, the Court said:

> "The bond in suit was given to secure full performance of that contract. The lower court held — we think, correctly—that the contract was invalid, and not binding upon the precinct, and hence that the bond was without consideration, and unenforceable. While at common law a bond was a formal contract, requiring no consideration, there can be no question that our statute abolishing private seals has reduced it to the level of all other agreements, and made it a simple contract. Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. Where a bond is given to secure performance of a contract, the entering into such contract by the obligee is

obviously its consideration, and, if the contract made is not binding upon the obligee, and he has done nothing of any legal validity or effect, the bond must fail."

In 9 Corpus Juris, at page 16, it is stated:

"As a general rule, a bond is not perfected until delivery thereof, and therefore delivery is essential to its validity, and it takes effect from that date. But in case of a statutory bond, the approval and filing takes the place of delivery."

In this case the bond was for the purpose of securing a license to do business, and was one of the requisites to doing business in the State, and when plaintiffs set forth that Chatterton & Son never qualified to do business in the State, plaintiffs are correct in that Chatterton & Son never filed their bond and were never licensed to do business as bean warehousemen, grain warehousemen, or public warehousemen of any kind or character. Plaintiffs attempt to show that the bond finally came into the hands of the Department of Agriculture, Labor and Industry, of the State of Montana, but that only after it and the renewal had expired and the loss had already occurred and Chatterton & Son were out of business and Healow had been discharged.

In 9 Corpus Juris, at page 17, it is stated:

"A bond must be delivered by the party whose bond it is, or by his agent or attorney. Where a bond is signed and sealed but not delivered to the obligee, and it is afterward put into his possession by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument; if the possession is secured wrongfully, accidentally, or inadvertently, the instrument will be held never to have taken effect."

And on page 18, of the same Volume, it is stated:

"Every bond, in order that it may be a binding obligation, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If, for any reason, an obligee in a bond refuses to accept it the bond does not become operative, and no liability on the part of the maker thereunder arises.

Statutory or official bonds made payable to the state cannot become effective until they are accepted by those duly authorized to accept them." (Italics ours).

The plaintiffs were required to prove the bond was delivered by the defendant, or some other agent, and that the same was received and accepted by those duly authorized to receive and accept the same, prior to their doing business, under which liability is claimed. A bond of the character herein sued upon is only liable for acts occurring after the conditions precedent under the Statute, such as the issuance of a permit, etc., have been fulfilled. In the case of State vs. Diebert (So. Dak.) 240 N.W. 332, grain had been delivered to a warehouse prior to the time a permit to operate a public warehouse had been executed by the Department. Receipts were given for the grain, but not regular warehouse receipts. Subsequently a permit was issued by the Department and the warehousemen then issued regular warehouse receipts to the owners of the grain. It appeared that the grain had disappeared from the warehouse prior to the time the permit was issued and the owners of the grain brought suit in the name of the State on the bond and recovered in the Lower Court. The Supreme Court of South Dakota reversed the case and held that the bond was only liable for acts occurring after the issuance of the permit.

Another case which is helpful on the question herein considered is American Surety Company vs. State (Tex.) 277 S.W. 790. See also 67 Corpus Juris, page 461.

RIGHTS OF PARTIES

As we have shown before, the plaintiffs below relied on the matter of a common-law or voluntary obligation, and we have previously shown that there is no such right in a bond of this character, and certainly the State of Montana only has a right to pursue its remedy under the Statutes of the State of Montana, and in this case the right only arises by reason of the same being construed as a statutory bond. Plaintiffs below also contended that they were entitled to reform this contract on the ground of mistake, but this is not true because of the fact that there could not have been any mistake between the State of Montana and the bonding company because at the time that the bond was entered into the law relating to grain warehousemen, hereinbefore quoted, was the only Act under which they had authority to license a warehouseman in and for the handling of grain, and it was not until after this case arose that counsel for these plaintiffs was responsible for passing a later Act, giving the State authority to bond bean warehousemen, to-wit, Chapter 55 of the Session Laws of the 23rd Session of the State of Montana, 1933, designated as "An Act Regulating the Business of Warehousing or Storing Beans", which was again changed or amended by Chapter 164 of the Session Laws of the State of Montana, 1935.

Although it is sometimes held that those in privity with the contracting parties have the right to ask for reforma-

tion, there are no grounds for reformation in this case, either in law or in fact. The facts are, as we have previously shown, that there was no mistake and that this bond was written on a blank form which had been furnished by the Department of Agriculture, and was executed by the defendant because of the fact that they thought that was the form of bond needed, and that they knew that, in the East, Chatterton & Son handled grain, and that it was necessary for them to have a bond to handle the same commodity in the State of Montana.

If there was any mistake, it was a mistake between Chatterton & Son, as principal, and the defendant, and it has been shown that Chatterton & Son made application for a public warehouseman's bond, which was the type that was written, so that, under any circumstances, it was a case of negligence on the part of said Chatterton & Son, and on the part of its agent, Healow, in not reading the contract when it was delivered, and this defendant should not be held responsible. As a matter of fact, negligence is a good defense against reformation. (53 C. J. 973).

Certainly, if any reformation was proper, at least the principal, Chatterton & Son, should have been joined as a party herein.

CONVERSION AND DAMAGES

Nowhere in this record is there any evidence of when the alleged conversion of the beans, for which loss damages is asked, except the expiration of the time limits in the bond.

The bond ran to July 1st, 1931. Healow testified that he was relieved of the management on July 2nd, 1931, and

the warehouse at Billings emptied of beans by July 13th, 1931, clear after the date of the bond limits. (Tr. 139).

It is shown that demand was made at Kansas City on Chatterton & Sons below, July 20th and 25th, 1931, for return of the beans. If this date fixes the conversion, then it was long after the bond had expired.

H. E. Chatterton, witness for the plaintiff, testified as follows:

> "Most of our warehouse receipts were issued in such a way that we did not agree to keep the identity of each different lot of beans intact. I know that after the failure, some shortage was found here at Billings, but I think that we had as many beans here as we had issued storage tickets for. I think that in June or July 1931 we had sufficient beans in this storage house to cover the storage receipts. That is, we meant to keep as many beans here as we had storage tickets for. That was our intention anyhow, and if they were not there, Mr. Healow had done that." (Tr. 202).

Healow testified:

> "As to what happened to the beans that were stored, from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders I shipped them from time to time. When I say "beans", I mean beans belonging to those various owners who had stored them. Usually consent was obtained from the growers before shipment. The manner in which consent would be obtained would be as follows: If we would be crowded for room over there, and we had a federal bonded warehouse at Kansas City and it was represented to them that they were just as safe there in a federal bonded warehouse as they were here, and there was no objection raised in some cases; but it was

not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent." (Tr. 137).

and again:

"I shipped beans out of this warehouse to the Kansas City plant and, when I did, I made the same arrangements with the holders of the warehouse receipts as if they were stored here; they were still their beans if they were not bought." (Tr. 154).

The report of Lindsay showed when shipments were made to Kansas City—during the period, but the testimony shows that beans were shipped there with the consent of the owners.

B. M. Harris, in his testimony, showed he found some of the beans at Kansas City and part hypothecated—but no date is fixed.

The record shows that the Billings warehouse was a branch of the Kansas City Department and beans from Billings were, from time to time, shipped there when they needed room. (Tr. 137).

No date is fixed when these beans were sold, stolen or hypothecated. Certainly it is incumbent for the Appellees to prove the loss or conversion and the time thereof.

In the California case of Palmer vs. Continental Casualty Co., 269 Pac. 638, the Court, in his connection, said, at page 639:

"The evidence does not show what day in March it was that plaintiff called at McCartney's office. It was conceded that it was after March 6th. Appellant, in her briefs filed herein, claims that it was on the 28th of March. Assuming this to be the fact, although we find no evidence to that effect, we fail to

see how plaintiff has made out her case against the bonding company. The burden was upon her to establish the fact that McCartney misappropriated the money during the time the bond was effective. There is not a scintilla of evidence in the record to show the time when McCartney made this misappropriation. Appellant claims that he did not abscond until after the 6th day of March, 1924; that this fact is some evidence that he misappropriated the money subsequent to that date. This claim cannot be sustained. His absconding may have been the result of his embezzlement, but that fact offers no proof whatever as to when the embezzlement occurred. Appellant has failed to show any right to recover on the bond, and, for this reason, the judgment must stand.''

It is fundamental that damage is based on the date of conversion. Sometimes it is fixed at the highest price between the date of demand and date of conversion, but there must be a date of conversion to fix the amount of the damages.

In the case of State vs. Broadwater, 61 Mont. 215, 201 Pac. 687, the Court, at p. 231, says:

> ''The precise date of this conversion is difficult to fix. It appears from the evidence that the defendant company disposed of all of its holdings, including its elevators, at a date not later than May 10, 1916.
>
> It is stated as a general rule that 'Ordinarily, the date of demand and refusal is the date of the conversion. If an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event.' (38 Cyc. 2032, and note 74).
>
> The trial court fixed June 1st as the date of conversion as to the Crowley and D'Arcy interests, and it appears that the demand and refusal of the Farms Com-

pany interest was August 2, 1916. For the purpose of this decision, these dates will be considered as the dates of the conversion."

We submit that there is not one scintilla of evidence to fix a date of conversion during the effective date of the bond.

AMOUNT OF JUDGMENT.

Specification of Error No. XLIV.

The amount of the bond herein sued upon is $10,000.00 (Tr. 13). The Court gave judgment for $13,100.00, with interest at 6% from July 15th, 1931.

We submit that, under no theory of law that we know of, is Appellant liable for more than the damages or loss up to but not exceeding the sum of $10,000.00, with interest from a fixed date when Appellant became liable to pay said sum.

9 C. J. 131 Sec. 243,
4 R. C. L. 68 Sec. 35.

V. CONCLUSION.

It has always been plain to the Appellant that the bond sued on herein was given to secure the statutory privilege of operating a warehouse in the State of Montana. The bond was not filed and no license was issued. There was no agreement between the Appellant, Fidelity and Deposit Company of Maryland, and the growers that any bond would be given, nor was there any agreement between the Fidelity and Deposit Company of Maryland and the State of Montana that said bond would be given.

The only excuse for reforming said bond, in our opinion, was that it was a statutory bond and was intended to comply with the Statute regulating the business of a bean

warehouseman. The Court reforms the bond to comply with a statutory bond for a bean warehouse, although there is a statutory grain warehouseman's bond provided for, and this particular bond was written on a printed form furnished by the said State of Montana.

The Court, however, after reforming this bond to apparently comply with a Statute for a bean warehouseman's bond (although said bean warehouseman's Act was not on the Statute books of the State of Montana until some three years after this action was brought), then holds that the liability is not statutory, but is a common-law liability. To arrive at this final conclusion, the Court went on the theory that a contract was entered into between the surety and his principal for the benefit of the growers, and that said contract was completed and fully executed when the bond was delivered by the surety company to its principal, even though it is very clear that it was never the intention of either the surety or the principal that the bond should become effective unless it was filed with the State in connection with the application for a license as a warehouseman handling grain and such license was issued. If we were to suppose that, after this bond had been executed by the surety and had been delivered to the principal, the application by Chatterton & Son for a warehouseman's license had been made and the bond tendered, but the license had been denied, certainly under such circumstances the fact that the warehousemen went ahead and violated the law and operated the warehouse without a license would not make the surety liable on a bond which was intended to become effective only in case a license was

issued. It seems to Appellant that there never was an executed contract until that contract was accepted by the State, who was the obligee named in the bond, and its acceptance evidenced by its issuance of the license in connection with which the bond was written.

We also submit that the total failure of the proof, even as to fixing the date of the conversion or loss and subsequent damages, was such that the plaintiff below should not have prevailed.

Respectfully submitted,

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Appendix

Sections of the Statutes of the Laws of the State of Montana, Involved Herein.

3573. The division of grain standards and marketing. The department of agriculture, labor and industry, through the division of grain standards and marketing, shall enforce all the laws of the state of Montana concerning the handling, weighing, grading, inspection, storage and marketing of grain, and the management of public warehouses.

3574. Definitions. Whenever the word "grain" is mentioned in this act, it shall be construed to include flax. The term "public warehouse" includes any elevator, mill, warehouse, or structure in which grain is received from the public for storage, milling, shipment or handling. The term "public warehouseman" shall be held to mean and include every person, association, firm and corporation owning, controlling, or operating any public warehouse in which grain is stored or handled in such a manner that the grain of various owners is mixed together, and the identity of the different lots or parcels is not preserved. The term "grain dealer" shall be held to mean and include every person, firm, association and corporation owning, controlling, or operating a warehouse, other than a public warehouse, and engaged in the business of buying grain for shipment or milling. The term "track buyer" shall mean and include every person, firm, association, and corporation who engages in the business of buying grain for shipment or milling, and who does not own, control, or operate a warehouse or public warehouse. The terms "agent," "broker," and "commission man" shall mean

and include every person, association, firm and corporation who engages in the business of negotiating sales or contracts for grain or of making sales or purchases for a commission.

3575.1 State scale expert - appointment - bond - deputy's bond - duties. ******

3575.2. Fees for scale inspection service. *****

3575.3. Payment of expenses of scale expert - contingent revolving fund. ****

3575.4. Certificate of test. *****

3575.5. Untested weighing devices not to be used - use of rejected devices forbidden. *****

3575.6. Permit to use weighing device until inspection. ******

3575.7. Penalty for making false test. *****

3575.8. Scale testing equipment to be transferred to department of agriculture. *****

3576. Appointment of chief inspector of grain, inspectors, samplers, weighers - qualifications of inspectors - interest in grain forbidden. *****

3577. Penalty for misconduct by inspectors, etc. *****

3578. Designation of inspection points - deputy inspectors. ******

3579. Charges of public warehousemen. Charges must be made by all public warehousemen subject to the provisions of this act, for the handling or storage of grain, as follows:

(a) Two cents per bushel for receiving, elevating, weighing, and immediate delivery on car of the identical grain without mixing. Immediate delivery - not less than

forty-eight hours but where conditions permit, special bin assemblage of grain without loss of identity for carload shipment shall be construed as immediate delivery, provided total period of assemblage and delivery does not exceed seventy-two hours. Provided in case said period is from seventy-two hours to one hundred and six hours, the entire charge shall be two and one-half cents per bushel, and from one hundred and six to one hundred and thirty hours, the charge shall be three cents per bushel. This rate for immediate delivery applies to all grain so delivered.

(b) Four cents per bushel for all grains except flax, for receiving, grading, weighing, elevating, insuring, fifteen days or part thereof free storage, and delivering to the owner. For flax this charge shall be five cents per bushel.

(c) Two cents per bushel for cleaning grain at request of owner where there are cleaning facilities, in which case screenings shall be delivered to owner.

(d) The charges for storage shall be: one-thirtieth of one cent per day per bushel for each day in storage after period of free storage has elapsed.

(e) Twenty-five per cent reduction from the above charges shall be allowed when the market price of wheat being sold at point of origin at time of sale is less than fifty cents per bushel.

Failure on the part of any public warehouseman to comply with the provisions of this act will render the licenses of such warehouseman subject to revocation and cancellation by the commissioner of agriculture.

3580. Establishment of standard grain grades - procedure. ******

3581. Fees for inspection and weighing. ******

3582. Records of weighing and grading - certificate. ******

3583. Removal of inspectors, samplers or weighers for misconduct. ******

3584. Appeals to commissioner of agriculture - hearing and order. ******

3585. Discrimination in charges by warehousemen prohibited. ******

3586. Duty of warehousemen to receive grain - warehouse receipt. Every public warehouseman shall receive for storage and shipment without discrimination of any kind, so far as the capacity of his warehouse will permit, all grain tendered him in the usual course of business in suitable conditions for storage. A warehouse receipt, in form prescribed by law and the rules and regulations of the commissioner of agriculture, shall be issued and delivered to the owner, or his representative, immediately upon receipt of such load or parcel of grain.

3587. Penalty for unlawful issue of warehouse receipt. It shall be unlawful for any public grain warehouseman to issue a receipt for grain, except on the actual delivery of the grain into the warehouse, or to issue a warehouse receipt for a greater amount of grain than that actually received.

Any person violating any of the provisions of this section, and any grain inspector knowingly permitting any grain to be delivered contrary to the provisions of this sec-

tion, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months.

3588. Regulation of sale and storage of grain - termination of storage contract - sale of grain for charges. ****

3588.1. Disposal of grain without notice to department of agriculture and compliance with law forbidden - delivery of grain for warehouse receipts. ****

3588.2. Possession by warehouseman considered bailment, when - prior right of warehouse receipt holder to grain. *****

3589. Annual report of warehouseman - special reports - penalty for failure to report - bond - license and fee - penalty for doing business without license. *****

3589.1. Protection of holders of warehouse receipts by intervention of department of agriculture - authority of department - action on bond - attorney general and county attorneys to assist. Whenever any warehouseman, grain dealer, track buyer, broker, agent or commission man is found to be in a position where he cannot, or where there is a probability that he will not meet in full all storage obligations or other obligations resulting from the delivery of grain, it shall be the duty of the department of agriculture, through the division of grain standards, to intervene in the interests of the holders of warehouse receipts or other evidences of delivery of grain for which payment has not been made, and the department of agriculture shall have authority to do any and all things lawful and needful

for the protection of the interests of the holders of warehouse receipts or other evidences of the delivery of grain for which payment has not been made, and when examination by the department of agriculture shall disclose that for any reason it is impossible for any warehouseman, grain dealer, track buyer, broker, agent or commission man to settle in full for all outstanding warehouse receipts or other evidence of delivery of grain for which payment has not been made, without having recourse upon the bond filed by said warehouseman, grain dealer, track buyer, broker, agent or commission man, it shall then be the duty of the department of agriculture for the use and benefit of holders of such unpaid warehouse receipts or other evidences of the delivery of grain for which payment has not been made, to demand payment of its undertaking by the surety upon the bond in such amount as may be necessary for full settlement of warehouse receipts or other evidences of delivery of grain for which payment has not been made. It shall be the duty of the attorney general or any county attorney of this state to represent the department of agriculture in any necessary action against such bond when facts constituting grounds for action are laid before him by the department of agriculture.

3590. Special inspection of grain. *****

3591. Sampling grain. *****

3592. Examination of grain cars at destination - license of grain weighers. *****

3592.1. License for seed warehouses. That all persons, firms, co-partnerships, corporations and associations operating any public warehouse or warehouses in this state

and which hold themselves out to the public as receiving agricultural seeds of any kind for storage for the public shall, on or before the first day of July of each year, pay to the state treasurer of Montana a license fee in the sum of fifteen dollars ($15.00) for each and every warehouse, elevator or other place owned, conducted or operated by such person or persons, firm, co-partnership, corporation or association wherein agricultural seed of any kind is received and stored, and upon the payment of such fee of fifteen dollars ($15.00) for each and every warehouse, elevator, or other place where agricultural seed is received and stored within the state of Montana, the commissioner of agriculture shall issue to such person or persons, firm, co-partnership, corporation or association a license to engage in the storing of agricultural seed at the place designated within the state of Montana, for a period of one year.

3592.2. Bond of seed warehousemen. Each such person, firm, co-partnership, corporation or association subject to the provisions of the act shall, on or before the first day of July of each year, give a bond with good and sufficient sureties to be approved by the commissioner of agriculture to the state of Montana, in such sum as the commissioner may require, conditioned upon the faithful performance of the acts and duties enjoined upon them by law. Any person, firm, association or corporation who shall commence the business aforesaid after the first day of July of any year shall be required to pay said license fee and furnish such bond before engaging in or carrying on any such business.

3592.3. Penalty for conducting business without license. Any person, firm, co-partnership, corporation or association who shall engage in or carry on any business or occupation for which a license is required by this act without first having procured a license therefor, or who shall continue to engage in or carry on any such business or occupation after such license has been revoked, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00), and each and every day that such business or occupation is so carried on or engaged in shall be a separate offense.

3592.4. Definition of "agricultural seeds." The term "agricultural seeds" as used in this act shall be held to mean and include the seeds of red clover, white clover, alsike, alfalfa, Kentucky bluegrass, timothy, brome grass, orchard-grass, redtop, meadow fescue, oatgrass, rye-grass, and other grasses and forage plants, corn, rape, buckwheat, beans, peas, and registered or certified seed grains in bags.

3592.5. Warehouseman to receive seed for storage without discrimination. *****

3592.6. Rules and regulations may be made by commissioner of agriculture - reports - form of warehouse receipts. *****

3592.7. Storage constitutes bailment. The storage of agricultural seed under the terms of this act shall constitute a bailment and not a sale and upon the return of the warehouse receipt to the proper warehouseman properly endorsed, and upon payment or tender of all advances and

legal charges the holder of such warehouse receipt shall be entitled to, and it shall be compulsory for the warehouseman to deliver to such owner and holder of the warehouse receipt, the identical agricultural seed so placed in said warehouse for storage.

3592.8. Additional bond required from grain warehousemen for seed storage. None of the provisions of this act shall be construed as requiring an additional license from a public warehouseman or other person, corporation or association, who is licensed to handle or store grain, but if any person, firm, co-partnership, corporation or association holding a license to handle or store grain shall also choose to engage in the business of storing any agricultural seed for the public it shall be necessary to furnish such additional bond as the commissioner of agriculture shall determine, and in the storage of such agricultural seed such person, firm, co-partnership, corporation or association shall be subject to the terms and conditions of this act.

No. 8433

United States

4

Circuit Court of Appeals

For the Ninth Circuit.

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a corporation, BABBITT BROTHERS TRADING COMPANY, a corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a corporation, and H. V. WATSON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8433

United States

Circuit Court of Appeals

For the Ninth Circuit.

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a corporation, BABBITT BROTHERS TRADING COMPANY, a corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a corporation, and H. V. WATSON,

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Parker Printing Company, 545 Sansome Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

NORRIS & PATTERSON,
First National Bank Building,
Prescott, Arizona,
GEORGE T. WILSON,
STROUSS & SALMON,
Title & Trust Building,
Phoenix, Arizona,
Attorneys for Appellant.
WILSON, WOOD & COMPTON,
JAMES E. BABBITT,
Flagstaff, Arizona,
Attorneys for Appellees. [3]

In the United States District Court for the District of Arizona.

September 1935 Term At Prescott

MINUTE ENTRY

Of January 4, 1936.

(Prescott Equity Minutes)

Honorable ALBERT M. SAMES, United States District Judge, Presiding.

E-181

C. D. BELL,

Plaintiff,

vs.

APACHE MAID CATTLE COMPANY, a corporation, BABBITT BROTHERS TRADING COMPANY, a corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a corporation, H. V. WATSON, F. A. SILCOX,

Defendants.

Defendants' Motions to Dismiss Plaintiff's Complaint; to Strike Portions of and to Make Portions of Plaintiff's Complaint more Definite and Certain, come on regularly for hearing this day.

Messrs. Norris and Patterson, by Charles L. Ewing, Esquire, appear as counsel for Plaintiff. No appearance is made on behalf of Defendants.

IT IS ORDERED that said Motions be continued and reset for hearing Saturday, February 1, 1936, at the hour of 9:30 o'clock, A. M. [4]

[Title of Court.]
Sept. 1935 Term At Prescott

MINUTE ENTRY

Of February 8, 1936
(Prescott Equity Minutes)

Honorable JAMES H. BALDWIN, United States District Judge, Specially Assigned, Presiding.

[Title of Cause.]

Motions of Defendants, Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, to Dismiss Plaintiff's Complaint; to Strike Portions of Plaintiff's Complaint, and to Make Portions of Plaintiff's Complaint More Definite and certain, come on regularly for hearing this day.

Messrs. Norris and Patterson, by Charles L. Ewing, Esquire, appear as counsel for Plaintiff. No appearance is made on behalf of Defendants.

Upon motion of Charles L. Ewing, Esquire, and upon his representation that counsel for Defendants consent,

IT IS ORDERED that said Motions be continued and reset for hearing Saturday, March 7, 1936, at the hour of 9:30 o'clock, A. M. [5]

[Title of Court.]

March 1936 Term At Prescott

MINUTE ENTRY

Of March 7, 1936.

(Prescott Equity Minutes.)

Honorable JAMES H. BALDWIN, United States District Judge, Specially Assigned, Presiding.

[Title of Cause.]

Motions of Defendants, Apache Maid Cattle Company, a corporation, Babbit Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, to Dismiss Plaintiff's Complaint; to strike Portions of Plaintiff's Complaint, and to Make Portions of Plaintiff's Complaint more definite and certain, and Plaintiff's Motion to Dismiss as to Defendant, F. A. Silcox, and Plaintiff's Petition for Leave to file Amended Complaint, come on regularly for hearing this day.

Messrs. Norris and Patterson, by John R. Franks, Esquire, appear as counsel for Plaintiff. No appearance is made on behalf of Defendants.

Upon motion of said counsel for Plaintiff,

IT IS ORDERED that said Motions and Petition be continued and reset for hearing Saturday, April 4, 1936, at the hour of 9:30 o'clock, A. M., at Prescott, Arizona. [6]

[Title of Court.]

March 1936 Term At Prescott

MINUTE ENTRY

Of April 11, 1936

(Prescott Equity Minutes)

Honorable HAROLD LOUDERBACK, United States District Judge, Specially Assigned, Presiding.

[Title of Cause.]

Defendants' Motions to Dismiss Complaint; to Strike Portions of Complaint and to make Portions of Complaint more definite and Certain; and Plaintiff's Petition to Dismiss Complaint as to Defendant, F. A. Silcox, and for leave to file Amended Complaint, come on regularly for hearing this day.

Messrs. Norris and Patterson, by W. E. Patterson, Esquire, appear as counsel for Plaintiff. No appearance is made on behalf of Defendants.

Upon motion of W. E. Patterson, Esquire, and upon his representation that counsel for Defendant consents thereto,

IT IS ORDERED that Plaintiff be granted leave to file an amended Complaint. [7]

[Title of Court and Cause.]

AMENDED COMPLAINT.

Comes now the plaintiff and for his bill of complaint and cause of action against the defendants, and each of them, alleges:

I.

That during all dates and times hereinafter mentioned the plaintiff herein, C. D. Bell, has been and is now a citizen and resident of the State of Michigan; that the defendants herein, Apache Maid Cattle Company, Babbitt Brothers Trading Company, and The Arizona Livestock Loan Company, were and are now corporations duly incorporated, organized, and existing under and by virtue of the laws of the State of Arizona, and each of said defendant corporations was and is now a citizen and resident of said state; that defendant, H. V. Watson, has been and is now a citizen and resident of the State of Arizona; that said defendant corporations were and are governed and controlled by the same officers and directors; and that the defendant, H. V. Watson, is an officer, director, and the managing agent of each of said three corporations, and was and is now in charge and control of the said corporations so far as the matters hereinafter alleged relate. [8]

II.

That the grounds upon which the jurisdiction of this court depends are the diversity of citizenship

of the parties hereto, the full names, citizenships, and residences of the parties to this action being as set forth above; and the amount in controversy, exclusive of interest and cost, exceeding the sum of $3,000.00.

III.

That prior to the 31st day of January, 1931, the plaintiff herein was the owner of certain real property adjacent to, and of certain improvements on the Coconino National Forest located in Coconino and Yavapai Counties, State of Arizona, together with approximately forty head of cattle ranging and running on said Forest under permit from the United States Forestry Service, and at said time was desirous of acquiring approximately 960 additional head of cattle together with additional grazing range and area on said Forest, to accommodate and maintain such additional cattle.

IV.

That at the dates and times of the transactions hereinafter mentioned, and prior thereto, the defendants and each of them, and particularly the Apache Maid Cattle Company, were engaged in the cattle business and, among other things, were the owners of 283 acres of patented land adjacent to, and of certain improvements on said Forest and used and maintained by them in connection with said cattle business; and were permittees of said Forest holding a permit from said Forest Service

under which they had the right to graze, run and maintain on said Forest 3,174 head of cattle, and as such permittees had the right to relinquish therefrom a sufficient number of head to leave unoccupied or unpermitted sufficient range for the running thereon of 960 head of cattle. [9]

V.

There heretofore and on or about the 31st day of January, 1931, defendants and each of them by and through the defendant, H. V. Watson, acting for himself and on behalf of defendant corporations, and the plaintiff herein entered into a contract, which said contract was partially written and partially oral; and by the terms of said contract it was understood and agreed between plaintiff and defendants, subject to the consent and approval of the United States Forestry service and the officials thereof, that defendants would sell, convey and deliver to plaintiff their said patented lands and their said improvements on said Forest together with sufficient range and area on said Forest to graze, run, and maintain throughout the year not less than 960 head of cattle net by relinquishing from their said permit on said Forest sufficient range and area to so graze, run and maintain said number of cattle; and that the plaintiff would purchase the same and pay to defendants therefor the sum of $16.00 per head for said cattle, the sum of $4,700 for said improvements, and the sum of $2,830 for said patented land, or a total of $22,890.

VI.

That at the time of entering into said contract and prior thereto said Forest Service had, unknown to the plaintiff, informed defendant, Apache Maid Cattle Company, that it would be required to reduce its number of cattle and grazing preference because of the overgrazed condition of said Forest; and at the time of entering into said contract, defendants, and each of them, well knew and understood that unless defendants fully met and absorbed the reduction required by said Forest Service out of other of their said cattle running on said Forest, the requirements of said Forest Service would extend to and affect the relinquishment of range for the grazing and [10] running of 960 head of cattle to be acquired by plaintiff pursuant to said contract, by greatly reducing the number of cattle said plaintiff would actually be permitted to graze, run or maintain on said Forest, and defendants further knew and understood at said time that, in order for said defendants to comply fully with the terms of said contract and to relinquish to plaintiff sufficient range and area on said Forest to graze and run 960 head of cattle and to cause same to be allotted to him by said Forestry Service, they would in fact have to relinquish many more than said number, all of which was unknown to plaintiff, and all of which was at all times concealed by the defendants from the plaintiff.

VII.

That thereafter plaintiff paid to defendants the

sum of $22,890 provided to be paid by said contract, and plaintiff otherwise fully performed all the terms of said contract on his part to be kept and performed; and in reliance on said contract and on the complete performance thereof by defendants and each of them, plaintiff expended a vast sum of money in the erection of fences, developments of water, and installation of other necessary improvements on the range and area on said Forest Reserve relinquished by defendants as hereinafter mentioned to graze and maintain 960 actual head of cattle, the exact amount of which said expenditures is difficult to estimate.

VIII.

That said defendants on their part conveyed said patented land and said improvements in Paragraph IV in this amended complaint mentioned to plaintiff as required by the terms of said contract and pretended to relinquish sufficient range on said Forest to graze, run and maintain 960 head of cattle, and defendants advised and informed plaintiff that they had executed the necessary instruments whereby said Forest Service did allot [11] to him range and area on said Forest sufficient to graze, run and maintain 960 head of cattle net, as provided in said contract, but, due to the said reduction in the number of defendants' cattle running on said Forest, as so ordered by said Forest Service, and the failure of defendants to absorb said reduction out of their remaining cattle on said For-

est, the said pretended relinquishment of 960 head of cattle was reduced by 320 head, and said defendants did in fact relinquish, and said Forest Service did allot to plaintiff, range and area sufficient to graze, run and maintain not more than 640 head of cattle, all of which was well known to, and understood by the defendants, and each of them, at the time of said pretended relinquishment. That during the month of October, 1933, plaintiff for the first time discovered the deception and fraud so practiced upon him by said defendants, and that defendants had not fully performed the terms of their said contract; that plaintiff thereupon immediately demanded of the defendants, and each of them, that they make further and proper relinquishment of additional area and range on said Forest, in order that there might be transferred by the Forest Service to plaintiff range and area sufficient to graze, run and maintain 960 head of cattle on said Forest as provided for in said contract and as paid for by plaintiff; but defendants, and each of them have failed, neglected and refused so to do, although during all times in this amended complaint mentioned, said defendants, and each of them, have been, and are now, well able to fully perform the terms of said contract on their part to be kept and performed.

IX.

That the United States Forestry Service and the officials thereof have heretofore consented to, and

approved and do now consent to the relinquishment by defendant of range on said Forest sufficient to graze, run and maintain 960 actual [12] head of cattle, and the granting and alloting of same by said Forest Service to plaintiff.

X.

That as a direct result and consequence of the failure and refusal of defendants, and each of them, to relinquish to said Forest Service range and area thereon, sufficient to graze, run and maintain an additional 320 head of cattle, to be allotted to plaintiff, as hereinbefore mentioned, said plaintiff has been, and is now, damaged in the sum of $5,120.

XI.

That each of said defendants has some interest in and to the permits, stock and range upon the said Coconino National Forest hereinbefore referred to, the exact interest, or the extent thereof, being to the plaintiff unknown; and the other defendants have some interest in the said permits, stock and ranges of said defendant, Apache Maid Cattle Company, but the exact interest, or the extent thereof, is to plaintiff unknown.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment and decree of this Court wherein and whereby it is adjudged and decreed:

1. That the defendants and each of them specifically perform the terms of said contract and that they, or one of them, be required to forthwith relinquish from the number of cattle now held in their names as permitted stock upon said Forest sufficient in number so as to warrant, authorize and require the United States Forest Service to allot and grant unto plaintiff a permit for 320 head of additional cattle, thus increasing his permit to 960 head to range upon the Forest [13] throughout each year during the life of said permit and any additional thereof.

2. That in the event specific performance of said contract cannot be had, then that plaintiff have judgment againt defendants, and each of them, for damages for breach of contract in the sum of $5,120.00.

3. That in either event plaintiff have and recover judgment of and from defendants, and each of them, for plaintiff's costs and disbursements incurred in this action; and for such other and further relief as to the Court may seem just, necessary and proper in the premises.

W. E. PATTERSON,
GEO. T. WILSON,
Attorneys for Plaintiff. [14]

State of Arizona
County of Maricopa—ss.

C. D. BELL, being first duly sworn deposes and says that he is the plaintiff mentioned and described in the foregoing amended complaint; that

he has read said amended complaint and knows the contents thereof; that all the matters, things, and allegations therein contained are true in substance and in fact of his own knowledge except those matters therein alleged upon information and belief, and of such matters he believes the same to be true.

(Sgd.) C. D. BELL.

Subscribed and sworn to before me this 29th day of February, 1936.

[Seal] (Sgd) RICHARD MINNE.

My commission expires March 4, 1938. [15]

[Endorsed]: Filed Apr 11 1936. [16]

[Title of Court and Cause.]

JOINT AND SEVERAL MOTION OF THE DEFENDANTS TO DISMISS THE AMENDED BILL OF COMPLAINT HEREIN.

Now come the defendants Apache Maid Cattle Company, Babbitt Brothers Trading Company, The Arizona Livestock Loan Company, and H. V. Watson, and jointly and severally move the Court to dismiss the amended bill of complaint herein, upon the following grounds:

I.

That the amended bill of complaint does not state facts sufficient to constitute a valid cause of action at law or in equity against said defendants or against any of them.

II.

That it appears from the face of said amended bill of complaint that said amended bill of complaint is wholly without equity.

III.

That the amended bill of complaint does not state facts sufficient to entitle the plaintiff to any relief.

IV.

That it appears in the amended bill of complaint that the plaintiff is not entitled to any relief arising from the facts alleged in said complaint. [17]

V.

That the amended bill of complaint does not state facts sufficient to entitle the plaintiff to specific performance of said alleged contract as set forth in said amended bill of complaint against said defendants or any of them.

VI.

That it appears from the face of said amended bill of complaint that the plaintiff is not entitled to specific performance of the contract set forth in said amended bill of complaint against the defendants or any of them.

VII.

That it appears from the face of said amended bill of complaint that the contract therein alleged, and which is the basis of action, is illegal and void, and is unenforcible, and that said plaintiff is not entitled to any relief thereunder.

VIII.

That it appears from the face of said amended bill of complaint that the cause of action is stale, and that so long a time has passed since the matters and things complained of took place, it would be contrary to equity and good conscience for this Court to take cognizance thereof.

WHEREFORE, defendants pray that the whole of the amended bill of complaint may be dismissed, and that the said defendants may be hence dismissed with their costs in their behalf incurred, and for such other and further relief as to the Court may seem just.

Dated this 23rd day of May, 1936.

JAMES E. BABBITT,
WILSON, WOOD and
COMPTON,
C. B. WILSON,
CHANDLER M. WOOD,
ORINN C. COMPTON,
Attorneys for Defendants. [18]

[Endorsed]: Filed May 28, 1936. [19]

[Title of Court.]

March 1936 Term At Prescott

MINUTE ENTRY

Of June 6, 1936

(Prescott Equity Minutes)

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

Defendants' Motion to Dismiss Amended Complaint, and to make Portions of Plaintiff's Amended Complaint more Definite and Certain, come on regularly for hearing this day.

No appearance is made on behalf of Plaintiff.

Messrs. Wilson, Wood & Compton, by Charles L. Ewing, Esquire, appear as counsel for Defendants.

Upon motion of said counsel for Defendants,

IT IS ORDERED that said motions be continued and reset for hearing at the next call of the Law and Motion Calendar at Prescott, Arizona. [20]

[Title of Court.]

March 1936 Term At Prescott

MINUTE ENTRY

Of July 6, 1936

(Prescott Equity Minutes)

Honorable DAVE W. LING, United States District Judge, Presiding.

[Title of Cause.]

Defendants' Motions to Dismiss Amended Complaint, and to Make Portions of Amended Complaint more Definite and Certain, come on regularly for hearing this day.

George T. Wilson, Esquire, appears as counsel for Plaintiff. Messrs. Wilson, Wood and Compton, by Chandler M. Wood, Esquire, and C. B. Wilson, Esquire, appear as counsel for Defendants.

Defendants' Motions to Dismiss Amended Complaint, and to Make Portions of Amended Complaint more definite and Certain, are duly argued by Chandler M. Wood, Esquire, and George T. Wilson, Esquire, and

IT IS ORDERED that said Motions to Dismiss and to Make Portions of Amended Complaint More Definite and Certain, be submitted and by the Court taken under advisement.

Upon motion of George T. Wilson, Esquire,

IT IS ORDERED that Plaintiff be allowed to file Memorandum of Authorities on sufficiency of Amended Complaint on or before July 9, 1936. [21]

[Title of Court.]

March 1936 Term At Prescott

MINUTE ENTRY

Of July 22, 1936.

(Prescott Equity Minutes)

Honorable DAVE W. LING, United States District Judge, Presiding.

[Title of Cause.]

Defendants' Motion to Dismiss Plaintiff's Amended Complaint, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Motion be granted, and that an exception be entered on behalf of Plaintiff. [22]

[Title of Court and Cause.]

NOTICE THAT PLAINTIFF STANDS ON HIS AMENDED COMPLAINT.

To WILSON, WOOD & COMPTON and JAMES E. BABBITT, attorneys for defendant and to the Clerk of the United States District Court, in and for the District of Arizona:

You, and each of you, will please take notice that the plaintiff, C. D. Bell, elects to stand upon his amended complaint herein.

NORRIS & PATTERSON,
Attorneys for Plaintiff. [23]

[Endorsed]: Filed Oct 14 1936. [24]

In the United States District Court for the District of Arizona

October 1936 Term At Phoenix

MINUTE ENTRY

Of October 15, 1936.

(Prescott Equity Minutes)

Honorable DAVE W. LING, United States District Judge, Presiding.

E-181

C. D. BELL,

Plaintiff,

vs.

APACHE MAID CATTLE COMPANY, a corporation; BABBIT BROTHERS TRADING COMPANY, a corporation; THE ARIZONA LIVESTOCK LOAN COMPANY, a corporation; H. V. WATSON, and F. A. SILCOX,

Defendants.

No appearance is made on behalf of Plaintiff. Messrs. Strouss and Salmon, by Charles L. Strouss, Esquire, appear as counsel for Defendants.

Thereupon, IT IS ORDERED that Plaintiff's Amended Bill of Complaint be dismissed, and that an exception be entered on behalf of the Plaintiff.

[25]

[Title of Court and Cause.]

NOTICE OF APPEAL.

NOTICE is hereby given that the plaintiff, C. D. Bell, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above cause on the 15th day of October, 1936.

NORRIS & PATTERSON,
W. E. PATTERSON,
First Nat. Bk. Bldg.,
Prescott, Ariz.,
STROUSS & SALMON,
619 T. & T. Bldg.,
Phoenix, Ariz.,
CHARLES L. STROUSS,
RINEY B. SALMON,
Attorneys for Plaintiff. [26]

[Endorsed]: Filed Dec 7 1936. [27]

[Title of Court & Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable Dave W. Ling, Judge of the District Court of the United States for the District of Arizona:

The plaintiff, C. D. Bell, feeling himself aggrieved by the decree made and entered in this cause on the 15th day of October, 1936, and by the proceedings had prior thereunto in this cause, does hereby appeal from said decree to the Circuit Court of

Appeals for the Ninth Circuit for the reasons specified in the assignments of error, which is filed herewith, and said plaintiff prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that the Court fix a bond for costs.

NORRIS & PATTERSON,
W. E. PATTERSON,
First Nat. Bk. Bldg.,
Prescott, Ariz.,
STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
619 T. & T. Bldg.,
Phoenix, Ariz.,
Attorneys for Plaintiff. [28]

[Endorsed]: Filed Dec 7 1936. [29]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

And now comes the plaintiff, C. D. Bell, and says that in the record proceedings and decree in this cause there is manifest error in this, to-wit:

First. The Court erred in granting the motion of the defendants, Apache Maid Cattle Company,

a corporation, Babbitt Brothers Trading Company, a corporation, the Arizona Livestock Loan Company, a corporation, and H. V. Watson, and each of them, to dismiss the amended complaint herein for the reasons (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

Second. The Court erred in entering a decree in favor of the defendants Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona [30] Livestock Loan Company, a corporation, H. V. Watson, and each of them, and against the plaintiff for the reason (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

WHEREFORE, plaintiff prays that said decree be reversed.

NORRIS & PATTERSON,
W. E. PATTERSON,
First Nat. Bk. Bldg.,
Prescott, Ariz.,
STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
619 T. & T. Bldg.,
Phoenix, Ariz.,
Attorneys for Plaintiff. [31]

[Endorsed]: Filed Dec 7 1936. [32]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The petition of the plaintiff, C. D. Bell, having been filed and presented to this Court, wherein it is prayed that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit upon the judgment, orders and rulings in this cause be allowed, and it appearing to the Court that the assignments of error concerning said appeal have been duly filed, and that said appeal should be allowed,

NOW, THEREFORE, IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree here-

tofore entered in this cause on the 15th day of October, 1936, be and the same is, hereby allowed.

IT IS FURTHER ORDERED that the transcript of the record and proceedings, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond for costs be, and is hereby, fixed in the sum of Seven hundred fifty ($750.00) Dollars.

Done in open Court this 7th day of December, 1936.

DAVE W. LING,
Judge United States
District Court. [33]

[Endorsed]: Filed Dec 7 1936. [34]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, C. D. Bell as principal and Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, and each of them, in the full and just sum of Seven hundred fifty ($750.00) Dollars, to be paid to the said Apache Maid Cattle Company, a corporation, Babbitt Brothers Trad-

ing Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, and each of them, their attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 7th day of December, 1936.

Whereas, lately at a District Court of the United States, for the District of Arizona, in a suit depending in said Court between C. D. Bell vs. Apache Maid Cattle Company, a corporation, et als. a decree was rendered against the said C. D. Bell and the said C. D. Bell having obtained an appeal and filed [35] a copy thereof in the Clerk's office of said Court to reverse and correct the decree in the aforesaid suit, and a citation directed to the said Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, citing and admonishing them, and each of them, to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, in said Circuit on the 6th day of January, 1937.

Now the condition of the above obligation is such that if the said C. D. Bell shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obliga-

tion to be void; else to remain in full force and effect.

C. D. BELL,
Principal.
HARTFORD ACCIDENT & INDEMNITY CO.,
[Seal] R. S. CONDIT,
Surety,
Attorney in fact.

Approved by
DAVE W. LING,
United States District Judge.
December 7, 1936. [36]

[Endorsed]: Filed Dec 7 1936. [37]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal to be allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

Amended Bill of Complaint.

Motion to dismiss filed on behalf of defendant, Apache Maid Cattle Company, a corporation.

Motion to dismiss filed on behalf of defendant, Babbitt Brothers Trading Company, a corporation.

Motion to dismiss filed on behalf of defendant, The Arizona Livestock Loan Company, a corporation.

Motion to dismiss filed on behalf of defendant, H. V. Watson.

Notice that plaintiff stands on amended bill of complaint.

Clerk's minute entries.

Decree.

Petition for allowance of appeal.

Assignments of error. [38]

Order allowing appeal.

Citation on appeal.

Notice of appeal.

Bond on appeal.

This praecipe.

Respectfully,
NORRIS & PATTERSON,
W. E. PATTERSON,
First Nat. Bk. Bldg.,
Prescott, Ariz.,
STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
619 T. & T. Bldg.,
Phoenix, Ariz.,
Attorneys for Plaintiff. [39]

[Endorsed]: Filed Dec. 7, 1936. [40]

[Title of Court.]
United States of America
District of Arizona—ss:

I, EDWARD W. SCRUGGS, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of C. D. Bell, Plaintiff, versus Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, H. V. Watson and F. A. Silcox, Defendants, numbered E-181 Prescott, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 40, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $5.00 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said Court this 31st day of December, 1936.

[Seal] EDWARD W. SCRUGGS,
Clerk. [41]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America.

The President of the United States to Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, H. V. Watson, and each of them, James E. Babbitt, Wilson, Wood & Compton, C. B. Wilson, Chandler M. Wood and Orinn C. Compton, their attorneys, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, on the 6th day of January, A. D. 1937 pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein C. D. Bell is appellant and Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson are appellees, and show cause, if any there be, why the decree entered in said cause should

not be corrected and why speedy justice should not be done in that behalf. [42]

WITNESS the Honorable Dave W. Ling, Judge of the United States District Court this 7 day of December, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States of America the one hundred and sixty-first.

[Seal] DAVE W. LING,
United States District Judge.

[43]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Arizona—ss:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named H. V. Watson by handing to and leaving a true and correct copy thereof with H. V. Watson personally at Flagstaff in said District on the 27th day of December, A. D. 1936.

B. J. McKINNEY,
U. S. Marshal.
By ROLAND MOSHER,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Arizona—ss:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named Apache Maid Cattle Co., by serving John G. Bab-

bitt, Vice President of said Co., Babbitt Bros. Trading Co., by serving John G. Babbitt, Lands Director of said Co., Arizona Livestock Loan Co., by serving John G. Babbitt, Director of said Co., by handing to and leaving a true and correct copy thereof with John G. Babbitt personally at Flagstaff in said District on the 9th day of December, A. D. 1936.

B. J. McKINNEY,
U. S. Marshal.
By ROLAND MOSHER,
Deputy.

[Endorsed]: Filed Dec. 30, 1936. [44]

[Endorsed]: No. 8433. United States Circuit Court of Appeals for the Ninth Circuit. C. D. Bell, Appellant, vs. Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed January 4, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a Corporation, BABBITT BROTHERS TRADING COMPANY, a Corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a Corporation, and H. V. WATSON,

Appellees.

APPELLANT'S BRIEF

NORRIS & PATTERSON,
W. E. PATTERSON,

STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
Attorneys for Appellant.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. Bell,

Appellant,

vs.

Apache Maid Cattle Company, a Corporation, Babbitt Brothers Trading Company, a Corporation, The Arizona Livestock Loan Company, a Corporation, and H. V. Watson,

Appellees.

APPELLANT'S BRIEF

Norris & Patterson,
W. E. Patterson,

Strouss & Salmon,
Charles L. Strouss,
Riney B. Salmon,
Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED

Pages

TABLE OF CASES AND AUTHORITIES CITED
(Continued)

INDEX TO APPENDIX

Excerpts from National Forest Regulations.

No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. Bell,

Appellant,

vs.

Apache Maid Cattle Company, a Corporation, Babbitt Brothers Trading Company, a Corporation, The Arizona Livestock Loan Company, a Corporation, and H. V. Watson,

Appellees.

APPELLANT'S BRIEF

JURISDICTION

Jurisdiction in the District Court was based on diversity of citizenship and an amount in controversy, exclusive of interest and costs, exceeding the sum of $3,000.

The statutory provision believed to sustain the jurisdiction in the District Court is Section 41, Title 28, United States Code.

The pleadings necessary to show the existence of the jurisdiction are paragraphs I and II of the Bill of Complaint which appear at pages 6 and 7 of the Transcript of Record.

Jurisdiction in the United States Circuit Court of Appeals for the Ninth Circuit is based upon the provisions of the United States Code prescribing the appellate jurisdiction of Circuit Courts and the pleadings transferring the cause to this Court for review.

The statutory provision believed to sustain the jurisdiction in the United States Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28, United States Code.

The pleadings necessary to show the existence of the jurisdiction and the pages where such pleadings appear in the Transcript of Record are:

Pleading	Transcript of Record Page
Notice of Appeal	21
Petition for Appeal	21
Assignments of Error	22
Order Allowing Appeal	24
Bond on Appeal	25
Praecipe for Transcript of Record	27
Citation on Appeal	30

STATEMENT OF THE CASE

The appellant, with leave of Court first granted, filed his Amended Bill of Complaint. The appellees moved

to dismiss the amended bill of complaint upon the grounds that (a) the amended bill did not state facts sufficient to constitute a cause of action at law or in equity, (b) the amended bill was wholly without equity, (c) the amended bill does not state facts sufficient to entitle plaintiff to relief by way of specific performance of the contract alleged, (d) the amended bill does not state facts sufficient to entitle plaintiff to any relief, (e) it appears from the face of the amended bill that the contract alleged as the basis of the action is illegal and void, and (f) it appears from the face of the amended bill that the cause of action is stale.

The appellees' motion to dismiss the Amended Bill was granted by the Court below and a decree was entered dismissing the Amended Bill of Complaint. From this decree the appeal is taken.

Other than those showing jurisdiction, the material allegations of the amended bill are:

Prior to January 31, 1931, the appellant was the owner of certain real property adjacent to, and certain improvements on, the Coconino National Forest in Coconino and Yavapai Counties, Arizona, and was the owner of forty head of cattle ranging and running on said National Forest under permits from the United States Forestry Service.

That at this time the appellees were the owners of 283 acres of patented land adjacent to and improvements on, said National Forest, and possessed the right under permits from the United States Forestry Service to graze 3174 head of cattle on said National Forest.

On or about January 31, 1931, the appellant entered into an agreement with the appellees whereby the appellees agreed to sell and transfer to the appellant the 283 acres of patented land, 960 head of cattle, and appellees' said improvement on the National Forest, and agreed to relinquish to the appellant sufficient grazing rights for the appellant to graze, run and maintain not less than 960 head of cattle throughout the year. In consideration thereof the appellant agreed to, and did, pay to the appellees the sum of $22,890.

The appellees conveyed the said patented land and improvements and transferred the 960 head of cattle to the appellant, and pretended to relinquish grazing rights sufficient to graze and maintain not less than 960 head of cattle throughout the year. In truth the grazing right relinquished by appellees to appellant was sufficient to graze and maintain only 640 head of cattle throughout the year and not 960 head of cattle as appellees had contracted, because prior to the agreement of on or about January 31, 1931, the appellees were notified by the United States Forestry Service that, because of overgrazing conditions in the National Forest, the appellees were required to reduce the number of cattle they were permitted to graze under their permits. Such reduction or relinquishment by the appellees to the government was necessary and effective before any relinquishment could be made to appellant. The appellees concealed this matter from the appellant. It was not until October, 1933, that the appellant discovered that the relinquishment to him amounted in fact to rights suffi-

cient to range only 640 head of cattle, and not 960 head. That the appellant had expended money for fence, the development of water and for other improvements and by reason of the appellees' failure to relinquish range sufficient to graze and maintain 960 head of cattle he had suffered damage in the amount of $5,120. That the appellant had no plain, speedy and adequate remedy at law.

ASSIGNMENTS OF ERROR

The first and second assignments of error appearing at pages 22 and 23 of the transcript of record will be relied upon by the appellant. Since the legal questions presented by the two assignments of error are identical they will be argued together.

SUMMARY OF ARGUMENT

Our argument will be presented under the following propositions:

1. The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged.

2. If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side, and not dismissed.

ARGUMENT

Assignment of Error

First. The Court erred in granting the motion of the defendants, Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, and each of them, to dismiss the amended complaint herein for the reasons (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

Second. The Court erred in entering a decree in favor of the defendants Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, H. V. Watson, and each of them, and against the plaintiff for the reason (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction,

a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

PROPOSITION I.

The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged.

The amended bill of complaint, after alleging matters of inducement to the contract, sets forth a contract, partly oral and partly in writing, consumated between the parties on or about the 31st day of January, 1931. It is alleged that the appellees agreed to sell and transfer to the appellant the 283 acres of patented land adjacent to the Coconino National Forest, 960 head of cattle, and certain improvements on said Coconino National Forest, and to relinquish to appellant, from the grazing rights held by the appellees on said Coconino National Forest, sufficient grazing rights to permit the appellant to graze throughout the year 960 head of cattle; and that the appellant agreed to purchase the same and pay to the appellees the sum of $22,890. It is alleged that the contract has been fully performed on the part of the appellant, and all provisions thereof to be performed by the appellees have been performed except the agreement by appellees to relinquish to the appellant sufficient range to graze 960 head of cattle, but appellees have relinquished only sufficient range to graze 640 head of cattle. The appellant asks that a decree of specific performance requiring the appellees

to relinquish additional range sufficient to graze 320 head of cattle. It is then only with that part of the contract for the relinquishment of range rights, and the appellees failure to perform the same, that we are here concerned.

The amended bill of complaint alleges that the appellees had the right under permits from the National Forestry Service to run 3174 head of cattle on the Coconino National Forest; that the appellees contracted and agreed with appellant to relinquish to appellant sufficient of such rights to allow appellant to graze 960 head of cattle throughout the year on such National Forest; that appellant has fully performed the obligations and agreements on his part to be performed but appellees have failed and refused to relinquish rights sufficient to graze more than 640 cattle on said National Forest.

Thus a plain legal and valid contract is alleged. A contract for the relinquishment of range rights as a part of a bona fide business transaction is legal and valid. Regulation G-9 provides that permits will be forfeited if sold or transferred for a valuable consideration. (Appendix page 24.) However, as will be seen from the instructions and procedure which accompanies the regulation it is not intended to prohibit the transfer of permits by relinquishment as a part of a bona fide business transaction, but only to prohibit bartering in permits as a separate right or property. (Appendix, page 25.) In fact, the regulation anticipates and permits the transfer of the permit by relinquishment in a

bona fide transaction of the character alleged in the complaint.

Nor need a decree for specific performance herein be directed to nor include a third party (Forestry Service) not a party to the contract because these provisions of the regulations (Instructions and Procedure, Appendix page 25) expressly provide for the transfer of the permit to the purchaser of a relinquishment in a bona fide transaction of the character here alleged.

There is no uncertainty as to the subject matter of the amended bill of complaint. It is alleged that the appellees owned grazing rights or permits sufficent to permit the grazing of 3174 head of cattle on the Coconino National Forest, and agreed to sell and transfer to appellant sufficient of *these rights and permits* to allow appellant to graze 960 head of cattle on said Coconino National Forest. It clearly appears that the rights which appellees contracted to sell and transfer to appellant were from these range rights of appellees in Coconino National Forest.

The complaint alleges that the appellant did not know or discover until October, 1933, that the appellees had failed to transfer to him relinquishments sufficient to allow him to graze 960 head of cattle and that he immediately demanded, and has since demanded of appellees that they relinquish to him additional range rights sufficient to graze an additional 320 head and appellees have refused so to do. The amended bill of complaint discloses that appellant acted promptly upon discovering the facts. There can be no laches.

The delay in discovering the breach is shown to have been due to the concealment by the appellees from appellant of the matters and facts concerning the notice to appellees by the Forestry Service that the range rights were reduced.

> "Laches in legal significance is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful. It is such delay as involves the inequity of permitting a claim to be asserted after the death of parties, change of title, intervention of the rights of others, where, in consequence, evidence has been lost or has become obscured, the discovery of the truth is made difficult, and the party attacked is placed in a position of evident disadvantage."
>
> *Humphreys v. Walsh,* 248 Fed. 414, 419.

And see:

Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214;

Galliher v. Caldwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 214;

Alsop v. Riker, 155 U. S. 461, 15 Sup. Ct. 162, 39 L. Ed. 218.

A defendant cannot take advantage of a delay caused or contributed to by his concealment.

Townsend v. Vanderwerkes, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383;

Loring v. Palmer, 118 U. S. 321, 6 Sup. Ct. 1073, 30 L. Ed. 211.

The contract was consummated on or about January 31, 1931. It does not appear, however, when it was to be performed or when the breach occurred. It is alleged that the breach was not discovered until October, 1933. It does not therefore appear from the allegations of the complaint that any applicable statute of limitations has run.

And we submit that as against a Motion to Dismiss the allegations of the amended bill of complaint sufficiently show the remedy at law is inadequate. In paragraph XII of the amended bill (trans. p. 12) it is directly alleged that there is no plain, speedy or adequate remedy at law. In addition we submit that it clearly appears from the allegations of the amended bill that the range rights which were the subject matter of the agreement, covered an area adjacent to, not only the patented property and the improvements on the Coconino National Forest already owned by appellant but likewise adjacent to the patented land and improvements on such National Forest purchased by appellant from the appellees as a part of this contract, and that relying on appellees agreement to transfer grazing rights sufficient to graze 960 head of cattle appellant had made other improvements on such National Forest. The subject matter of this agreement was not personal property, which upon failure to deliver can be duplicated, but a right or interest in realty. In equity it is assumed with respect to contracts involving land or rights in land that the purchaser contracted for the particular subject matter of the contract, and hence

that a recovery of damages for breach of the contract will not constitute an adequate remedy.

Wilhite v. Skelton, 149 Fed. 67;

McClurg v. Crawford, 209 Fed. 340;

Annotation, 65 A. L. R. 39 et seq.

We respectfully submit that the amended bill of complaint states a cause of action in equity entitling the appellant to relief by way of specific performance, and that the order and decree of the court below granting the motion of the appellees to dismiss the action, and dismissing the action, should be reversed.

PROPOSITION II.

If equity jurisdiction is wanting, the amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side and not dismissed.

As pointed out in our argument under the preceding proposition the amended bill of complaint alleges a valid and legal contract whereby the appellees agreed to relinquish to the appellant range rights under the permits from the Forestry Service sufficient to permit the appellant to graze 960 head of cattle on the Coconino National Forest throughout the year. The allegations of the bill show an adequate consideration moving from the appellant to the appellees, and that such consideration has been paid to the appellees by appellant, and all conditions to be performed by the appellant have been performed. Demand by the appellant of the ap-

pellees that they relinquish to appellant and that they perform the contract and the refusal by the appellees are alleged. The bill alleges the damage to the appellant by the appellees' failure to perform and prays that if specific performance cannot be decreed that appellant have judgment for his damages.

Every allegation necessary to a cause of action at law for damages is set forth in the amended bill of complaint.

Day v. Chism, 10 Wheat 449, 6 L. Ed. 363.

Equity Rule No. 22 (28 U. S. C. A. 723) provides:

> "RULE 22. ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

And in Section 247a of the Judicial Code (28 U. S. C. A. 397) it is provided:

> "*Amendments to pleadings.* In case any United States court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause

> shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

In *Diamond Alkali Co. v. Tomson & Co.* (Third Circuit) 35 Fed. 2d 117, the action was in the nature of a bill for specific performance. The case was tried to the court in the District Court, which dismissed the bill for want of equity. The Circuit Court in reversing the decree held that, although the plaintiff had not moved that the cause should be transferred to the law side, and the trial court did not transfer it of his own motion, under Equity Rule 22 the Circuit Court would direct that it be transferred to the law side it appearing that the bill stated a cause of action for breach of contract.

In *Kelley v. United States,* 30 Fed. 2d. 193, 194, this Honorable Court quoted with approval from the decision of the Eighth Circuit Court in *Pierce v. National Bank of Commerce,* 268 Fed. 487, as follows:

> "Did the complaint state facts sufficient to constitute a cause of action, either at law or in equity, for if it stated a cause of action at law, this case should have been transferred to the law side of the court, and there proceeded with. The fact that a complainant in equity has an adequate remedy at law is no longer sufficient ground for dismissal of the suit. Equity Rule 22. * * *"

In *Pierce v. National Bank of Commerce,* supra, the plaintiff filed a bill of complaint for discovery and

accounting in relation to certain mortgage bonds, and applied for an interlocutory injunction. Defendant moved to dismiss the complain for failure to state a cause of action. The appeal was from the decree dismissing.

If the amended bill of complaint herein failed to state a cause of action in equity, it stated a cause of action at law for breach of contract and should have been transferred to the law side of the court.

We respectfully submit that the order and decree of the District Court dismissing the amended bill of complaint should be reversed.

Respectfully submitted,

Norris & Patterson,
W. E. Patterson,
First National Bank Bldg.,
Prescott, Arizona,

Strouss & Salmon,
Charles L. Strouss,
Riney B. Salmon,
Title & Trust Building,
Phoenix, Arizona,
Attorneys for Appellant.

APPENDIX

EXCERPTS FROM THE NATIONAL FOREST MANUAL REGULATIONS AND INSTRUCTIONS, UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE.

Grazing

The Secretary of Agriculture has authority to permit, regulate, or prohibit grazing in the national forests. Under his direction the Forest Service will allow the use of the forage crop as fully as the proper care and protection of the forests and water supply will permit. The cattle and sheep which are grazed in the national forests bear an important relation to the supply of beef and mutton in this country, and every effort will be made by forest officers to promote the fullest possible use of grazing resources. The utilization of forage grasses and plants also reduces the fire danger and helps protect the forests. In addition to national forests where the livestock industry is of special importance, existing grazing privileges will be continued at first, and if a reduction in number is afterwards found necessary stockmen will be given ample opportunity to adjust their business to the new conditions. Every effort will be made to distribute the stock on the range satisfactorily in order to secure greater harmony among the users of the forests, to reduce the waste of forage through unnecessary movements of stock, and to obtain a more permanent, judicious and profitable use of the range. The leading objects of the grazing regulations are:

1. The protection and conservative use of all national forest land adapted to grazing, under principles conforming to the natural conditions surrounding the forage resources.

2. The permanent good of the livestock industry through the proper care and improvement of the grazing lands, under principles conforming to the requirements of practical operation.

3. The protection of the settler and established ranch owner against unfair competition in the use of the range.

It is expected that the stock owners will earnestly cooperate in carrying out the regulations.

There is no law which gives an individual or corporation the right to graze stock upon national forest lands. The grazing of such lands may be allowed by the Secretary of Agriculture only as a personal privilege. This privilege is a temporary one allowable under the law when it does not interfere with timber production or watershed protection. It is transferable only within the limits and restrictions set forth in these regulations.

Stock owners have been suffered to graze their stock upon the public lands of the United States under certain conditions of occupancy, residence, and ownership of improved land or water rights. This use, continued, throughout a long period of years, has in the absence of congressional legislation become the accepted custom in many communities, even receiving the recognition of certain of the courts. It is allowed, however, only

by passive consent of the United States. By force of the presidential proclamation creating a national forest, such passive consent ceases and is superseded by definite regulations issued by the Secretary of Agriculture under the authority of Congress. Grazing stock upon the forests, except in accordance with these regulations, is trespass against the United States.

Permits will be issued to graze a certain number of livestock in each national forest, or part thereof, so long as no damage is done by such stock. A reduction will be made from the number of stock grazed during the previous season if, owing to the number grazed or the method of handling the stock, damage is being done to the forest, and in extreme cases all stock will be excluded.

Except as provided under the regulations, all grazing permits are issued upon a per capita charge.

Authorization

Reg. G-1. The Secretary of Agriculture in his discretion will authorize the grazing of livestock upon the national forests under such rules and regulations as he may establish.

The Forester will prescribe the number and class of stock to be grazed on any national forest on which grazing has been authorized by the Secretary. * * *

Applications and Permits

Reg. G-2. Every person must submit an application and secure a permit in accordance with these regulations before his stock can be allowed to graze on a na-

tional forest, except as hereinafter provided and unless otherwise authorized by the Secretary of Agriculture. The Forester may authorize the issuance of grazing permits for a term of years within a maximum of 10 years. A term permit shall have the full force and effect of a contract between the United States and the permittee. It shall not be reduced or modified except as may be specifically provided for in the permit itself and shall not be revoked or cancelled except for violation of its terms or by mutual agreement. The grazing regulations shall be considered as a part of every permit.

The few head of livestock in actual use by prospectors, campers, and travelers, or used in connection with permitted operations on a national forest, or not to exceed 10 head of milch, work, or other animals owned and used for domestic purposes by bona fide settlers residing within or contiguous to a national forest may be allowed to graze free, under such restrictions as the Forester may prescribe.

All stock grazed under paid permit on national forests must be actually owned by the permittee.

Instructions and Procedure

* * *

Application Should Be Complete

All applications for grazing permits must be submitted on forms furnished by forest officers and the information necessary to complete the application must be furnished in detail. Forest officers should require that every question contained in applications forms

be answered by applicant, either affirmatively or negatively. The information required to complete the forms serves as a basis for the apportionment of grazing privileges and constitutes an essential record maintained by the Forest Service. All statements should be complete and should be checked and verified. * * *

Action on Application After Final Date

The application having been acted upon and the notices of approval forwarded no changes will be made to accommodate persons who failed to file their applications in time, unless their failure was caused by circumstances which, in the supervisor's opinion, warrant a readjustment of range allotments. Negligence or failure to exercise ordinary diligence will not be considered a satisfactory reason for the approval of an application after the date set.

In case the total number of any kind of stock applied for before the date which has been set does not equal the number authorized to graze on the forest, late, supplemental, or new applications may be approved at any time until this number has been reached.

Method of Approving Applications

The supervisor will immediately notify the applicant of the approval of his application by a letter of transmittal (Form 861-G) showing the number of stock for which the aplication has been approved, the period, and the fees to be paid. Any unusual conditions may be noted on the form. Whenever an amendment or a correction is made, or a supplemental or temporary application is approved, the notice will be marked "Amended," "Corrected", "Supplemental," or "Temporary," etc. A duplicate of each Form 861-G issued

will be sent to the district forester at once and a triplicate filed in the supervisor's office.

Form 861-G for term permits will designate the year for which payment is to be made, thus: "Term permit, first year."

Applications may be amended, supplemented, temporarily cancelled, approved, or disapproved. * * *

Preferences

Reg. G-7. For the purpose of contributing to the stability of the livestock industry and making the forage resources of the national forests of the greatest value, the Forester shall provide for the recognition of preferences in the use of national forest ranges and the renewing of permits, to an extent consistent with the prevention of monopoly and with the principle of a reasonable distribution of grazing privileges.

Persons who are full citizens of the United States shall be given preference in the use of national forest ranges over other persons.

The following classification of applicants for grazing privileges is hereby established:

Class A. Persons owning and residing upon improved ranch property which is dependent upon the national forest, and who are owners of not more than the established exemption limit number of stock, or the protective limit number in the absence of an exemption limit.

Class B. Prior users of national forest range who do not own improved ranch property, and persons owning such property who own stock in excess of the established exemption limit, or the protective limit in the absence of an exemption limit.

Class C. Persons who are not regular users of national forest range and who do not own improved ranch property. This class can not aquire an established preference in the use of national forest range.

Instructions and Procedure

No Legal Rights in National Forest Range

A preference may be acquired in the allotment of grazing privileges, but no legal right will accrue to the use of national forest range. This preference does not entitle the holder to continue use of a certain part of the forest but only to a preference over other applicants less entitled to consideration in the use of the range open to a given class of stock.

"Preferences" and "Permits"

A grazing preference entitles the holder thereof to special consideration over other applicants, but to no consideration as against the Government. The holder of the preference is a preferred applicant. Grazing preferences run on year after year indefinitely until canceled or revoked. A grazing permit is a document authorizing the grazing of livestock under specific conditions. It expires at a certain stated date. The terms "preference" and "permit" are not synonymous, and care should be exercised in their use. * * *

Reductions

Purposes

Reductions on grazing preferences are made for two purposes: Protection and distribution. Protection reductions may be made at the close of any grazing season

in any amount the circumstances justify. Reductions for distribution in any year on annual permits above the protective or exemption limits shall not, together with reductions for protection, exceed 10 per cent in the case of commensurate ranch property, or 20 per cent in the absence of such property. The 10 and 20 per cent reductions may be applied entirely for distribution.

Distribution may be defined as the granting of preference to qualified new class A applicants and increasing preferences of qualified class A permittees below the protective or exemption limit.

Reductions—How Applied

When reductions are necessary, temporary permits will be terminated first. If this is insufficient, reductions on a flat-rate basis for distribution may be made on preferences above the exemption limit, or in the absence of an exemption limit on preferences above the protective limit. Protection reductions may be made on any preference, but as far as practicable they will be applied only on preferences above the exemption limit or above the protective limit in the absence of an exemption limit.

Any preference resulting from the division of an outfit during the preceding grazing season may be reduced as though the outfit had not been divided.

Necessary reductions on a flat-rate basis for protection may be made in term permits at the end of any grazing year during the term-permit period. During the term-permit period, a reduction may be made for dis-

tribution which, taken together with all reductions made for protection during the period, does not exceed 10 per cent.

If during any year, the reductions made on established preferences are not used or needed for the purposes for which they were made, the original preferences will be considered the following year as if no reduction had been made.

Each term permit shall specify the maximum cut that can be made for distribution, which shall not exceed 10 per cent, and the maximum cut that may be made for all purposes, including protection, which shall be established in accordance with local range conditions. The possible reduction for range protection during the term-permit period should be not less than 10 per cent unless this requirement is waived by the district forester. The district forester may in his discretion, when local range conditions require, restrict permits to an annual basis. * * *

Permits to Purchasers

Reg. G-9. To facilitate legitimate business transactions, under conditions specified by the Forester, and unless otherwise authorized or limited by the Secretary of Agriculture, and upon satisfactory evidence being submitted that the sale is bona fide, a purchaser of either the permitted stock or the dependent, commensurate ranch property of an established permittee will be allowed a renewal of permit in whole or in part, subject to the maximum limit restrictions, provided the purchaser of stock only, actually owns dependent, com-

mensurate ranch property, and the person from whom the purchase is made waives to the Government his preference for renewal of permit. A renewal of permit on account of purchase from a grantee who has used the range less than three years will not be allowed.

A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration.

Instructions and Procedure

Purpose of the Regulation

Regulation G-9 provides for administrative control in connection with business transactions involving grazing privileges between persons, companies, or corporations whose enterprises are dependent in whole or in part upon the use of national forest range. The regulation has been so framed as to permit as much freedom of action as possible in such matters consistent with good administration.

Proof of Validity of Transfer

Before any consideration will be given an application for renewal of permit on account of purchase, satisfactory evidence must be submitted to the forest supervisor that the sale is bona fide.

A statement should be submitted showing the character, location, and amount of ranch property upon which the application for renewal is based and the connection it has with the stock.

Title to the stock or land involved must pass directly from the person executing the waiver to the purchaser applying for the permit.

Waiver of Preference

A waiver of preference (Form 763) will be required in all cases where the original permittee desires to relinquish claim to a renewal of permit.

Free Permits to Purchasers

In case a permittee sells during the permit period and consents to the purchaser's continuing to graze the stock on the national forest, upon presentation to the supervisor of evidence that the sale is bona fide, the original permit will be canceled and a new permit issued to the purchaser without charge for the remainder of the period for which fees have been paid. If only a portion of the stock is sold, an amended permit for the number of stock retained will be issued to the original permittee, and a free permit to the purchaser for the number purchased. No transfer of fees on the record is necessary in such cases. Cross reference entries will be made on the record cards.

Sale of Stock After Approval of Application

When stock is sold after the application for a grazing permit has been approved and prior to the beginning of the grazing period, if the permittee does not waive his grazing preference although willing to forego use of the range for the current season, the original application will be cancelled and the application of the purchaser will be approved upon its merits as a new applicant, subject to the regulations.

Ranch Property

Ranch property must be fully commensurate and dependent and conform to the definition of ranch property under the instructions of Regulation G-9.

Purchase of Stock and Ranches

If the ranch property is commensurate, dependent, and used in connection with the permitted stock, the purchaser of both the stock and ranches of a permittee will be allowed a renewal of permit for the permittee's established grazing preference, subject to the maximum limit restrictions and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 10 per cent may be made. If the ranch property is not fully commensurate, a proportionate reduction should be made in the number of stock for which renewal of permit is allowed.

Purchase of Stock Only by Owner of Improved Ranch

A purchaser of permitted stock who owns improved ranch property, dependent and commensurate and used in connection with the stock, or who acquires such ranch property from persons other than the original permittee, will be allowed a renewal of permit for the permitee's established grazing preference, provided that the maximum limit restriction is not exceeded and a waiver from the original permittee is filed with the application for renewal. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made.

Purchase of Ranch Property Only

One who purchases from the permittee commensurate dependent ranch property without the permitted livestock will be allowed a renewal of permit for the preference waived, subject to the maximum limit and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made.

Leased Land Not Acceptable

The applicant for renewal must hold legal title to the lands, as leased lands do not meet the requirements of the regulations. * * *

GRAZING FEES

Reg. G-10. A fee will be charged for the grazing of all livestock on national forests, except as provided by regulation, or unless otherwise authorized by the Secretary of Agriculture, or in cases where the forester may determine it is to the interest of the United States to permit free grazing

The forester is authorized to determine the fair compensation to be charged for the grazing of livestock on the national forests, upon the basis of the following factors:

(1) A proper use of the grazing resource to best serve the public interest.

(2) Reasonable consideration of the value of the forage to the livestock industry.

(3) Effect of the rates upon the livestock producers.

An additional charge of a 2 cents per head will be made for sheep or goats which are allowed to enter the national forests for the purpose of lambing or kidding.

No charge will be made for animals under six months of age at the time of entering the forest, which are the natural increase of stock upon which fees are paid or for those born during the season for which the permit is allowed. * * *

Payments and Refunds

Reg. G-11. All grazing fees are payable in advance of the grazing period, unless otherwise authorized by the Forester. Crossing fees are payable in advance of entering the national forest.

When an applicant is notified that his application has been approved, he will remit the amount due for the privilege to the designated United States depository. Persons who fail to pay the fees as above specified must notify the proper forest officer and give satisfactory reasons. Failure to comply with the above provisions may be sufficient cause for denying a grazing or crossing permit.

When a permittee is prevented from using the forest by circumstances over which he has no control or for some justifiable cause does not use the privilege granted him, in the discretion of the district forester a refund of the fees paid will be made in whole or in part as the circumstances may justify and the Government's interests will permit. * * *

Grazing Periods

Establishment of Grazing Periods

The district forester will establish the opening date for year-long periods. He will also establish the shorter grazing periods, but in his discretion may delegate this function to forest supervisors.

Points to Consider in Fixing Grazing Periods

Grazing periods will be established for each national forest to meet the general need of the stockmen and to secure economical use of the forage. An endeavor should be made to adjust periods to local conditions and to allow grazing only when the particular range in question can be used to the best advantage without injury to the forest. It is inadvisable to hold stock on winter range or in feed lots after the range within a forest is ready for use, but it is decidedly unwise to allow stock on forest ranges before the feed has well started, or while the range is so wet that the stock will cause injury to both the forage and tree growth. The condition of the range rather than the desires of the applicants must determine the period. Supervisors should recommend periods which secure the best use of the range without damage. They should avoid the establishment of too many periods which create administrative difficulties in grazing supervision.

Seasonal Periods May Be Shortened Under Term Permits

For the purpose of forest protection, it may be necessary to shorten in any year the grazing periods allowable under term permits.

Special Periods

When grazing periods have been fixed by the district forester or the supervisor, stockmen will be required to secure permits and pay the fees for the full period. Special periods can be allowed only in cases where the circumstances render such action equitable to the Government and to other stockmen needing range. For example, if a certain range will support 10,000 head of sheep from June 1 to October 31, the issuance of a permit to graze 10,000 head of sheep from July 1 to September 30 means a loss of forage values, a loss of revenue to the Government and a loss of opportunity by others than the permittees to put stock on the range.

Monthly Permits.

Monthly permits will be authorized only where special conditions warrant it. Despite the fact that they may be more convenient to the permittees, there are several factors which render the general issuance of permits on a monthly basis impracticable from an administrative viewpoint. The practice will result in a disregard of the periods of use to which the ranges are naturally adapted, with consequent incomplete utilization, alternate understocking and overstocking, loss of range capacity, loss of control, and loss of revenue. Such permits would necessarily be subject to extension and additional payments would be required. For these reasons monthly permits will not be allowed unless demanded by exceptional conditions.

Additional Time Allowance

The supervisor may allow stock to enter not more

than 15 days in advance of the date fixed for the beginning of a grazing period, or allow it to remain 15 days after the expiration, without additional charge, when the needs of the users demands such action and the condition of the range warrants it. The additional time allowed shall not exceed a total of 15 days during any one grazing period and will not be stated in the permit, but permission to enter before or remain after the regularly established dates will be given either by general notice or by letter written to the applicant. (See instructions under Reg. G-10.)

Larger Number for Shorter Period

Under unusual conditions, where the interests of the range and the stockmen justify such action, a proportionately larger number of stock for a shorter period than the established grazing period may be allowed, provided the period is shortened at the beginning rather than at the end.

Extension of Permits

If suitable range is available within the national forest, grazing permits for short periods may be canceled and extended permit issued for any of the longer periods established for the forest.

Protection of Short Period Permittees

If the stock which graze in common upon a single grazing unit are covered by permits for different periods so that a portion enter the range considerably in advance of the balance, a reasonable proportion of the unit should be designated as the early range. The stock

which enter first should be confined to the part so designated until the beginning of the last or shorter period, after which the entire unit may be used in common by all stock allotted to it.

Counting Stock

Procedure

When an owner who has a permit is ready to drive in his stock he may be required to notify the nearest forest officer by mail or otherwise, of the number to be driven in. If called upon to do so, he must provide for having his stock counted before entering a national forest, or at any time afterwards when the number of stock appears to be greater than the number covered by the permit.

The judgment of forest officers making counts of stock of uncertain age shall be conclusive in making allowances for exemptions under Regulation G-2.

When Unnecessary

Where the local forest officers are in possession of reliable information that the number of stock being brought in by a permittee is not in excess of his permit number, counting may be dispensed with.

Counting Report

A report on stock counted (Form 874-18) will be sent to the supervisor when he may require it.

Stock in Excess of Permit Number

Slight discrepancies from the number covered by permit may be permitted when an exact count is im-

possible. When such count is possible, a slight excess in a large permit may be overlooked or a supplemental application for the excess required.

Ordinarily an excess of 1 per cent may be ignored. If the range is heavily stocked, any greater excess should be removed from the herd before it is allowed to enter. If the range is not heavily stocked, the excess number may be allowed to remain in the herd if the owner will immediately apply for a supplemental permit for the whole excess.

Feed-lot Counts

Counting in the feed lots can be done at a time when it will interfere little with a ranger's duties. An applicant who refuses to allow his stock to be counted in a feed lot may be required to arrange for a count before entering the forest, or to round up at any time thereafter if the supervisor has reason to believe that the number being grazed is in excess of the permitted number.

Round-ups

A count of the permittee's cattle on the range is a difficult and expensive matter. Consequently special round-ups for counting should be avoided unless absolutely necessary and wherever possible the number ascertained by other methods.

Regular beef, calf, or general round-ups inaugurated by the stockmen themselves should in no way be under the control of the Forest Service. Forest officers detailed to accompany a round-up will give first attention

to their work, which is to determine the numbers of permitted stock. They should, however, help the stockmen where the can and avoid unnecessary disregard of the authority of the person in charge of the work.

Calf Tally

Under ordinary conditions of range stock raising, four times the number of calves branded in an average year will approximate the total number of stock the owner has, from yearling up. To illustrate, if a man brands 100 calves in a normal season, it is probable that he has about 400 head of cattle, counting yearlings and beef on the range. The calf tally multiplied by 5 will give the approximate number of stock the owner will have on the range in the following year, less the number of head sold and lost.

Sale Records

The record of stock sold and slaughtered, which may be obtained usually from the State livestock board and checked by railroad records when the stock is shipped from railroad points, will furnish a close check on the number of stock a permittee is grazing, provided he is not selling stock raised by other users of the range. When stock is grazed on a forest during the entire year, the supervisor may require permittee to furnish satisfactory evidence of the removal of a number of stock equal to the natural increase.

Handling of Stock

Reg. G-13. Forest officers shall require methods of handling stock on the national forests designated to

secure proper protection or the resources thereon and dependent interests, and may require the owners of livestock to give good and sufficient bond to insure payment for all damage sustained by the Government through violation of the regulations or the terms of the permit.

No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a Corporation, BABBITT BROTHERS TRADING COMPANY, a Corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a Corporation, and H. V. WATSON,

Appellees.

MOTION TO STRIKE

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THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. Bell,

Appellant,

vs.

Apache Maid Cattle Company, a Corporation, Babbitt Brothers Trading Company, a Corporation, The Arizona Livestock Loan Company, a Corporation, and H. V. Watson,

Appellees.

MOTION TO STRIKE

Comes now the appellant and moves the Court for an order striking from Appellant's Brief the following:

1. The figures and words "960 head of cattle" appearing in line 4 on page 4 of Appellant's Brief.

2. The figures and words "and transferred the 960 head of cattle" appearing in line 12 on page 4 of Appellant's Brief.

3. The figures and words "960 head of cattle" appearing in lines 7 and 8 of argument under Proposition I, page 7, Appellant's Brief.

As grounds for said motion Appellant says that the matters sought to be stricken are errors in the statement of facts, inadvertently made and not discovered until after Appellant's Brief was filed.

Respectfully submitted,

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No. 8433

IN THE

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For the Ninth Circuit

C. D. BELL,

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APACHE MAID CATTLE COMPANY (a corporation), BABBITT BROTHERS TRADING COMPANY (a corporation), THE ARIZONA LIVESTOCK LOAN COMPANY (a corporation), and H. V. WATSON,

Appellees.

BRIEF FOR APPELLEES.

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Table of Contents

Table of Authorities Cited

N.

R.

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U.

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No. 8433

IN THE

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Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellees deem it advisable briefly to recite the allegations of the amended bill of complaint of the appellant and to call attention to the reasonable inferences and conclusions to be drawn therefrom.

1. The amended bill of complaint, hereinafter in this brief referred to as the bill of complaint, sets forth that the appellees were the owners of 283 acres of patented land adjacent to, and improvements on, the Coconino National Forest, and possessed the rights

under permits from the United States Forest Service to graze 3174 head of cattle on said National Forest.

2. On or about January 31, 1931, the appellant entered into an agreement with the appellees whereby, subject to the consent and approval of the United States Forest Service and the officials thereof, the appellees would sell, convey and deliver to the appellant their said patented lands and said improvements on said Forest "together with sufficient range and area on said Forest to graze, run and maintain throughout the year not less than 960 head of cattle net by relinquishing from their said permit on said Forest sufficient range and area so to graze, run and maintain said number of cattle; and that the plaintiff (appellant herein) would purchase the same and pay to defendants (appellees herein) therefor the sum of $16.00 per head for said cattle, the sum of $4700.00 for improvements, and the sum of $2830.00 for said patented land, or a total of $22,890.00". (Plaintiff's Complaint, Paragraph V; Transcript of Record, page 8.)

It is to be noted that the contract as alleged

(a) Does not give the location of the range and area to be relinquished, other than a general description that it is in the Coconino National Forest, which National Forest is described in Paragraph III of the complaint as being situated in Coconino and Yavapai Counties, State of Arizona (T. 7) and that the portion of the range to be relinquished is a part of a much larger area.

(b) Does not state whether the obligation assumed by the appellees was to deliver a definitely agreed upon area or whether it was simply a general obligation on the part of the appellees to deliver sufficient range in the Coconino National Forest to graze, run and maintain 960 head of cattle. It would seem, however, that the latter construction of the agreement as alleged is the more reasonable under the language used to describe such agreement.

(c) If the agreement on the part of the appellees was only to furnish sufficient range to run 960 head of cattle, it does not appear whether the range thus to be relinquished was to be determined by appellant, by appellees, or by mutual agreement.

(d) The range relinquished was to be sufficient to run the specified number of head "throughout the year", which, obviously, must mean the year 1931, in January of which the contract was entered into, and not throughout subsequent years. No agreement could be made as to the number of cattle that could be run in succeeding years upon such range relinquished, as control thereof under the Forest regulations lies exclusively with the Forest Service, and under its regulations may, from time to time, be reduced. (See excerpts from the National Forest Manual Regulations and Instructions, United States Department of Agriculture, Forest Service, attached as an Appendix to appellant's brief under the caption "Reductions" pages 22-24.)

(e) While the appellant in his brief assumed that the alleged contract included a sale of 960 head of

cattle at $16.00 per head, although the allegations of the bill of complaint as a whole do not support such assumption, he, by his motion to strike all references to any sale of cattle on the ground that statements with reference thereto in his brief are errors, concedes that no cattle were sold and that the consideration for the relinquishment of the range rights by the appellees was computed upon the basis of $16.00 per head of cattle that appellant would be permitted to graze thereon.

3. It is further alleged in the complaint that at the time of entering into said contract and prior thereto, the appellee, the Apache Maid Cattle Company, had been notified by the Forest Service that, because of over-grazed conditions of the Forest, it would be required to reduce its number of cattle and grazing preference, and appellees knew that, in order to relinquish sufficient range and area to permit appellant to run 960 head of cattle, they would, in fact, have to relinquish a much greater range than at the time of making the contract would have been sufficient for that purpose. (Complaint, Paragraph VI; Transcript of Record, page 9.)

4. That this alleged notification by the Forest Service was concealed from the appellant by the appellees and was unknown to appellant.

5. That appellant thereupon paid to appellees the consideration of $22,890.00 payable under said alleged contract and expended a vast sum of money in the erection of fences and other improvements, and the appellees, besides conveying the patented lands and

improvements "pretended to relinquish sufficient range on said Forest to graze, run and maintain 960 head of cattle". That the appellees informed the appellant that they had executed the necessary instruments whereby the Forest Service allotted to him sufficient range for his purpose of grazing 960 head of cattle, but, as a matter of fact, "the said pretended relinquishment of 960 head of cattle was reduced by 320 head" and said Forest Service actually allotted to appellant range and area sufficient to graze, run and maintain not more than 640 head of cattle.

It may be inferred that the consideration was paid and the relinquishment effected some time during the year 1931 if the obligation of the appellees was only to furnish range sufficient to run 960 head of cattle throughout the year.

6. That the appellant did not discover the alleged fraud of appellees until October, 1933, or almost three years after the contract as pleaded was entered into.

APPLICABLE AND MATERIAL REGULATIONS AND INSTRUCTIONS OF THE FOREST SERVICE.

The appellant in his bill of complaint has failed to distinguish between preferences and permits. For the convenience of the court, attention is called to certain regulations and instructions of the Forest Service which are pertinent to the determination of the sufficiency of the bill of complaint, and of the right of the appellant to the relief sought, or any relief whatsoever. References are to pages in appellant's brief

under the appendix entitled: "Excerpts from the National Forest Manual Regulations and Instructions, United States Department of Agriculture, Forest Service", pages 16 to 36, inclusive.

(a) The difference between preferences and permits is set forth on page 22, which provides:

> "A grazing preference entitles the holder thereof to special consideration over other applicants, but no consideration as against the Government. The holder of the preference is a preferred applicant. Grazing preferences run on year after year indefinitely until canceled or revoked. A grazing permit is a document authorizing the grazing of livestock under specific conditions. It expires at a certain stated date. The terms 'preference' and 'permit' are not synonymous, and care should be exercised in their use. * * *"

(b) Applications for permits must be duly made by applicants. The supervisor will notify the applicant of the approval of his application by letter of transmittal, Form 861-G, showing the number of stock for which the application has been approved, the period, and the fees to be paid. (Pages 19-21.) Grazing fees are set forth in Regulation G-10, pages 28-29.

(c) Reductions in preferences and permits are to be made in the manner and to the extent set forth on pages 22-24 under the caption "Reductions".

(d) Regulation G-9, pages 24-25, deals with permits to purchasers, and is quoted in full:

> "Reg. G-9. To facilitate legitimate business transactions, under conditions specified by the

> Forester, and unless otherwise authorized or limited by the Secretary of Agriculture, and upon satisfactory evidence being submitted that the sale is bona fide, a purchaser of either the permitted stock or the dependent, commensurate ranch property of an established permittee will be allowed a renewal of permit in whole or in part, subject to the maximum limit restrictions, provided the purchaser of stock only, actually owns dependent, commensurate ranch property, and the person from whom the purchase is made waives to the Government his preference for renewal of permit. A renewal of permit on account of purchase from a grantee who has used the range less than three years will not be allowed. A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration."

The sale of the permit, therefore, to the appellant under the alleged contract as set forth in his bill of complaint, being made for a valuable consideration, subjected such permit to forfeiture. The contract as pleaded is accordingly illegal and void.

(e) The procedure required of the appellees under the contract as alleged in accordance with said regulations and instructions would be for them to waive to the Government their preference for renewal of the permit in question in whole or in part. The appellant in his application for the new permit would also have to present to the Forest Supervisor satisfactory evidence that the sale was bona fide. (See caption en-

titled Proof of Validity of Transfer, page 25.) If, however, the facts as alleged in the bill of complaint had been presented by the appellant that the range was being relinquished for a valuable consideration, the permit would necessarily have been forfeited.

(f) In case of purchase of ranch property only without stock as in the instant case, the procedure to be followed by the purchaser is set forth under the caption "Purchase of Ranch Property Only", page 28, which reads as follows:

> "One who purchases from the permittee commensurate dependent ranch property without the permitted livestock will be allowed a renewal of permit for the preference waived, subject to the maximum limit and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made."

Since the appellant purchased only ranch property and not the stock, the foregoing provision is applicable.

CONCLUSIONS TO BE DRAWN FROM ALLEGATIONS OF BILL OF COMPLAINT IN VIEW OF PROCEDURE REQUIRED BY FOREST SERVICE IN TRANSFERRING RANGE.

1. The alleged contract of appellant and appellees was illegal and void, and upon discovery of the fact that the permit or a portion thereof had been sold or transferred for a valuable consideration, the officers of the Forest Service would be required to forfeit the permit.

2. The appellant, upon waiver of the preference by the appellees, and upon his own application, would

receive his permit showing the number of cattle he would be allowed to run under such permit.

3. There is no allegation that the appellees failed to waive their preference for 960 head of cattle.

4. The appellant is presumed to know the regulations of the Forest Service, and that any permit obtained by him as the result of the waiver of the preference of the appellees would be subject to revision by the Forest Service of the amount of cattle that could be run upon range allotted to him under the renewal of permit to him.

5. Upon receipt of the permit to him, after the filing of such waiver, he had actual knowledge of the cattle he could run upon such range.

6. If he did not discover said fact until October, 1933, or about three years after the contract was made, it would logically follow that it was not carried out until that belated date, or that he failed and neglected during that period to apply for a permit.

7. Since the contract was made in January, 1931, and the alleged agreement of appellees was only to relinquish sufficient range to run 960 head of cattle "throughout the year", it would seem that a waiver three years later of that same amount of preference would constitute no breach if a permit issued in 1931 would have enabled the appellant to have run 960 head of cattle during that year.

8. The bill of complaint is defective in not alleging how and in what manner the appellant discovered in October, 1933, the fact he could run only 640 head of cattle.

SUMMARY OF ARGUMENT.

The motion to dismiss filed by the appellees was granted by the court on July 22, 1936. The appellant, by notice filed October 14, 1936, elected to stand upon his pleadings, and thereupon the order of dismissal was entered.

Position of appellant.

The appellant in his assignment of errors argues that the court erred in granting the motion and entering the order for dismissal, for the following reasons:

(a) Appellant's Proposition I. That said complaint alleges facts sufficient to constitute a cause of action against said appellees and each of them within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the appellant to relief by a decree for the specific performance of the contract alleged.

(b) Appellant's Proposition II. That if said complaint is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the court.

Position of appellees.

In answer thereto, the appellees state their position as follows:

(a) Appellant's Proposition I. Said complaint did not allege facts sufficient to constitute a cause of action against said appellees, or any of them, within the equity jurisdiction of the District Court, or to entitle the appellant to relief by decree for specific performance of the contract alleged, for the following reasons:

First. The court, under its decree, could only order the waiver of the preference of appellees so as to provide additional range for 340 head of cattle subject to application for a permit by appellant to run such number of cattle, and the approval of the permit by the Forest Service including the approval of the amount of range and cattle to be run thereon.

Second. The alleged contract is too indefinite and uncertain to be enforced.

Third. The alleged contract is not one that the court could properly assume to decree its specific performance.

Fourth. The alleged contract is illegal and void under the regulations of the Forest Service.

Fifth. Upon the facts alleged, appellant has either waived his right to additional range or his claim is stale.

(b) Appellant's Proposition II. The cause should not have been transferred to the law side of the court, for the following reasons:

First. A cause of action at law is not stated.

Second. The contract as alleged is illegal and void.

Third. Under the facts and records in this case, if a cause of action at law were properly stated, equity rule 22 would not apply.

PROPOSITION I.

THE BILL OF COMPLAINT DOES NOT STATE A CAUSE OF ACTION WITHIN THE EQUITY JURISDICTION OF THE DISTRICT COURT FOR RELIEF BY WAY OF SPECIFIC PERFORMANCE OF THE CONTRACT ALLEGED.

First. The court, under its decree, could only order the waiver of the preference of appellees so as to provide additional range for 340 head of cattle subject to application for a permit by appellant to run such number of cattle, and the approval of the permit by the Forest Service including the approval of the amount of range and cattle to be run thereon.

As previously pointed out by reference to the regulations of the Forest Service, in order that a purchaser of ranch properties, as in the instant case, may be granted a renewal of permit of Forest range, two things are necessary, namely, that the purchaser must actually own dependent, commensurate ranch property, and the person from whom such purchase is made must waive to the government his preference for renewal of permit. Such grazing preference is not a property right. (Regulation G-9, pages 24-25.) The purchaser must thereupon make an application for a permit, stating the number of cattle he desires to run, and, if it be approved by the government, a letter of transmittal is sent him, Form 861-G, showing the number of stock for which the application has been approved, the period, and the fees to be paid. (Pages 19-21.) Such permit is subject to reduction in the amount of cattle to be run, as is set forth on pages 22-24 under the caption "Reductions". To require the appellant to waive a preference for an additional 340 head of cattle would first necessitate a determination as to whether sufficient range was to be released

to permit the appellees to run 960 head of cattle in the year 1931, or to permit them to run such cattle at the time the decree of court may be entered. It is alleged that the Forest Service consents to the relinquishment of range so as to permit the running of 340 additional head of cattle, but there is no allegation, nor would the regulation support an allegation that the Forest Service would consent to any arbitrary selection of range by the court thus to be relinquished by the waiver of preference, or that at the time the attempt to enforce the decree was made such range would be sufficient to graze, run and maintain that number of head of cattle. There is no allegation that the appellant would make application for any such permit or would pay his grazing fees. The order of the court simply could be that the appellees waive their preference to the government, which would be a futile act in event the proper steps were not taken by the appellant, subject to the approval of the Forest Service, to secure a permit for himself. It might well be that the court and the Forest Service would disagree as to the extent and character of range that would be necessary or proper to run 960 head of cattle, or if they did agree at any time, a subsequent change of conditions before enforcement of the decree would make it ineffective. It comes within the generally well recognized principle of law that a court will not decree specific performance of a contract where the consent or approval of a third party would have to be obtained.

Thus, it was held in the case of *Langford v. Taylor,* 99 Va. 577, 39 S. E. 223, that the government's consent

to removal of whiskey being necessary, the court will not decree the transfer of whiskey stored in a United States warehouse in the absence of a showing that plaintiff is ready to pay the tax necessary to obtain the government's consent. It is further stated in this case that "a court of equity will not interfere in specific performance where the court would be unable to enforce its own judgment".

Fry, Specific Performance, Sec. 27;
Ellis v. Treat, 236 Fed. 120;
Wichita Water Company v. City of Wichita, 280 Fed. 770.

Second. The alleged contract is too indefinite and uncertain to be enforced.

Under the allegations of the complaint, the appellees were to deliver sufficient range and area to run 960 head of cattle for the year. As before stated, it would seem that the pleader does not intend to allege that this range and area was agreed upon. If it were, of course, the appellant should specifically set forth its description. It is obvious that the agreement as alleged was simply to deliver sufficient range and area without specification as to its location or extent, except the general allegation that it is located in the Coconino National Forest, situated in Coconino and Yavapai Counties, Arizona. The complaint does not state by whom the range and area were to be selected. It seems apparent that a court of equity cannot pick out some indefinite part of a range owned by the appellees and order the appellees to sign a waiver of their preference for the same to the government so as

to allow a new permit to be issued to appellant if he then decides to apply for it.

A contract to be specifically performed must be definite and certain and free from doubt, vagueness and ambiguity in all its essential elements. The contract as pleaded is not definite and certain and is most vague and ambiguous in its essential elements. It is fatally defective as to the identity of the subject matter. It contains no description of the property or range rights of the appellees which appellant seeks to have relinquished or conveyed. No means whatever are set forth to identify the range. It is uncertain as to whether a range thus to be transferred is range sufficient to graze 960 head of cattle throughout the year 1931 or 960 head of cattle at some indefinite future time. It is also uncertain, if the decree is entered, that such range will be sufficient for that purpose immediately thereafter. The Forest Service may reduce or increase the allotment. It is obvious that a court of equity will not determine what amount of range is sufficient to graze 960 head of cattle and decree specific performance, nor will it go out and select such range. It is well established as a principle of law that a court of equity will not decree the specific performance of a contract by the sale, exchange or conveyance of land or an interest therein, unless the contract designates or describes the land with definiteness and certainty, or furnishes or refers to means or data by which it can be identified and located by the aid of extrinsic evidence.

58 *C. J.*, Specific Performance, Section 100, page 935; and cases cited.

Thus, these contracts have been held too indefinite and uncertain for specific performance:

For the conveyance of a place of which a named person is in possession without further identifying it.

Edwards v. Rives, 35 Fla. 89, 17 So. 416.

Or land described under a contract as follows:

"My land, the entire tract, 728 acres."

Barnett v. Nichols, 56 Miss. 622.

Or a contract for the sale of a part only of a tract of land which fails to designate the specific portion to be conveyed.

McMillan v. Wright, 56 Wash. 114, 105 Pac. 176.

Or a contract for the sale of ten lots with a provision stamped across it to the effect that the vendor may substitute other lots containing the same number of square feet.

Salles v. Stafford (La.), 132 So. 140.

Or a contract for the sale of forty-eight acres one mile east of a certain town.

Gilman v. Brunton, 94 Wash. 1, 161 Pac. 835.

Or a contract for the sale of three thousand acres in a named county and state.

Rosen v. Phelps (Tex.), 160 S. W. 104.

Thus, in Section 110, 58 C. J. page 942, in the article on specific performance, it is stated: "A designation of the land as a certain quantity out of a larger described tract as of so many acres out of a specified

tract, is insufficient, where the boundaries of the part are not stated, or the part has not been carved out."

Rempke et al. v. Buehler, 203 Ill. 384, 67 N. E. 796;

Knight et al. v. Alexander et al., 42 Oregon 521, 71 Pac. 657; and numerous cases cited therein.

Third. The alleged contract is not one that the court could properly assume to decree its specific performance.

The determination of what range will be sufficient to graze, run and maintain any number of cattle depends upon the grazing condition of such range, which will differ in different localities in the same Forest and in different years. It cannot be mathematically determined, depending upon varying climatic, forage and grazing conditions, and upon the protection of the range in the Forest as a whole. It requires expert and scientific knowledge. A District Court judge should not reasonably be required to ride the range to ascertain conditions and the amount of area required for the purpose, because he cannot be assumed to have the required expert knowledge, and because in the last analysis whatever he might decree would be subject to the final determination of the Forest Service under its regulations and its policy of range protection.

58 *C. J.,* Section 45, page 889.

Fourth. The alleged contract is illegal and void under the regulations of the Forest Service.

It is specifically provided under Regulation G-9, pages 24-25, that sales of Forest permits are forbidden. The regulation provides specifically "that permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration." This range is alleged to have been sold for a valuable consideration. If appellant had informed the Forest Service of the facts as stated in this alleged contract, the permit would have been forfeited. It is, therefore, as pleaded, an illegal and void contract, and neither an action at law can be maintained for damages under said contract, nor can an action for specific performance be maintained in the equity courts.

An identical case in point is *McFall v. Arkoosh,* 215 Pac. 978 (Ida.). This case was for damages for breach of a contract involving the sale and purchase of certain sheep, and in connection therewith an attempt was made to sell, for a valuable consideration, certain grazing rights on the National Forest possessed by the vendor. A verdict was rendered in favor of the purchaser, and, upon appeal, judgment was reversed and the District Court was directed to dismiss the action. In its opinion the court said:

> "At the close of the case it had been conclusively shown that the agreement upon which respondent relied in bringing this action was one forbidden by the regulations governing national forests. 1918

Use Book, p. 113, Reg. G-18. Both parties were conclusively presumed to know that the federal statutes authorized the Secretary of Agriculture to make regulations governing the grazing of stock on national forests (U. S. Comp. Stats. Sec. 823, 5126), and the courts of this state take judicial notice of such regulations. C.S. Sec. 7933. Caha v. United States, 152 U.S. 211, 14 Sup. Ct. 513, 38 L.Ed. 415. Such regulations have the force and effect of law. United States v. Grimaud, 220 U.S. 520, 31 Sup. Ct. 480, 55 L.Ed. 569; United States v. Eliason, 16 Pet. 291, 10 L.Ed. 968.

The contract, being clearly in violation of the regulations governing national forests, no action could be maintained for its enforcement, and respondent, being in pari delicto with appellant, under the rule generally followed by the courts, could not maintain an action for money paid pursuant to such an agreement. The law leaves such parties where it finds them. Libby v. Pelham, 30 Idaho, 614, 166 Pac. 575; Lingle v. Snyder, 160 Fed. 627, 87 C.C.A. 529; 13 C. J. p. 492, Sec. 440; 2 Page on Contracts, p. 1920, Sec 1089; 2 Elliott on Contracts, p. 344, Sec. 1067."

Regulation G-18 referred to was substantially the same as G-9 now in force, and provided as follows:

"Reg. G-18. Permits will be granted only for the exclusive use and benefit of the owners of the stock, and will be forfeited if sold or transferred in any manner or for any consideration. * * *"

Fifth. Upon the facts alleged, appellant has either waived his right to additional range or his claim is stale.

The contract as pleaded by the appellant, was entered into on or about January 31, 1931, and provided that the appellant was to relinquish sufficient range to run 960 head of cattle throughout the year. There is no allegation as to when the consideration was paid and the waiver of the preference to the government was executed and delivered.

If, on the one hand, this was done during the year 1931, the appellant, in order to have cause of complaint, would have had to file application for a permit covering the relinquished range, stating the number of cattle he desired to run on the range, and would have received a letter of transmittal from the government stating the number of cattle he could run upon it. By accepting such permit and paying the consideration, he would necessarily waive any breach, and if he had applied for or received the permit for 640 head of cattle before paying the consideration, and permitted approximately three years to pass without seeking relief from the appellees, it would appear that, upon the allegations of his bill, he is guilty of laches.

If, on the other hand, the contract was not consummated and the permit was not applied for during the year 1931 when it was made, then the effect of the relinquishment being to give the appellant only 640 head of cattle because of reductions made in the meantime by the Forest Service, could not and would not constitute a breach of the agreement.

The law is clear that the effect of laches is not avoided by a general averment appellant was ignorant of the facts until a certain time. There must be distinct averments as to when knowledge of the fraud or deception was obtained, why it was not obtained earlier, and as to the diligence of the appellant in investigating the transaction. The mere allegation of concealment and ignorance is not sufficient. The law must presume that the appellant has reasonable intelligence and would know all these years his rights to the range. An inquiry of the Forest Service at any time would have given him such information.

Hubbard v. Manhattan Trust Co., 87 Fed. 51;
Northern Pacific Railway Co. v. Kindred, 14 Fed. 77;
Credit Co. v. Arkansas Central Railway Co., 15 Fed. 46;
Kessler v. Ensley Co., 123 Fed. 546;
United States v. Christopher, 71 Fed. (2d) 764.

This rule is well stated in *Stearns v. Page,* 7 How. 819, 12 L. Ed. 928, as follows:

> "A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment—must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments

as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

PROPOSITION II.

THE CAUSE SHOULD NOT HAVE BEEN TRANSFERRED TO THE LAW SIDE OF THE COURT.

First. A cause of action at law is not stated.

The reasons set forth in the caption marked "Second" under Proposition I, why the bill of complaint does not state a cause of action in equity, apply equally to a cause of action upon the same alleged facts as an action in law for damages. No breach is shown because there is a failure to allege that the appellant at any time attempted to run or obtained the right to run 960 head of cattle on the Forest, or that he made a request for a permit giving him that right, or that any such request was denied by the Forest Service. Furthermore, the subject matter of the alleged contract is so indefinite and uncertain that the description of the property or range rights involved cannot be ascertained from the pleading, nor is reference made to means and data alleged by which it can be identified and located. The allegations with regard to such range and area are not sufficient upon which damages can be predicated.

The rule applicable thereto is stated as follows:

"It is said to be an elementary rule that in order that a contract may be enforceable the prom-

ise or the agreement of the parties to it must be certain and explicit, so that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to. The contract must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter. In addition to a definite promise, the SUBJECT MATTER of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty. A contract which is so uncertain in respect of its SUBJECT MATTER that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be obtained, is unenforceable. * * *" (Capitals ours.)

6 *R. C. L.,* Par. 59, page 644.

The above rule is well illustrated in the early case of *Marriner v. Dennison,* 20 Pac. page 386, wherein it is stated:

"The real estate is described in the agreement as lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract. In what city, county, state, or country the land is situated does not appear. If the instrument were one attempting to convey title to property, its insufficiency would be apparent. But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a

new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. (Citing cases.) But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were 'my' farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were 'a' farm in Los Angeles county, it could not be rendered certain by the allegation of such etrinsic matter. (Citing cases.) It is not sufficient to allege that by the imperfect description given in the contract the parties intended to convey certain property. (Citing cases.) Thus it is said in Browne, St. Frauds, Sec. 371: 'The contract must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.' Again, in section 385: 'It must, of course, appear from the memorandum what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified.' (Citing cases.) It is not enough, as we have said, to allege that by such incomplete description the parties intended to convey a certain tract of land. Such extrinsic facts must be alleged as will, in connection with such description, show that the particular piece of land was intended. If the facts

alleged, together with the description set out, are not sufficient to identify the land, the contract must be held to be void for uncertainty."

This rule is again affirmed by the California District Court of appeal in the case of *Diffendorf v. Pilcher,* 2 Pac. (2d), page 430.

This principle is also followed in the cases cited below:

Wright v. L. W. Wilson Co. Inc., 290 Pac. 64 (Cal.);

McMahan v. Plumb, 96 Atl. 958 (Conn.);

Scanlon v. Oliver, 44 N. W. 1031 (Minn.).

Brockway et al. v. Frost, 41 N. W. 411 (Minn.) holds that an agreement for the conveyance of a designated number of acres "in" a specified larger tract is ineffectual because of uncertainty, and denies right of recovery of money alleged to have been paid as the purchase price.

Second. The contract as alleged is illegal and void.

This has been fully discussed in the caption marked "Fourth" under Proposition I, and we do not deem it necessary again to burden the court with a reiteration of our argument in this connection. It is the position of the appellees that no relief can be had under the contract as alleged either in law or in equity, for the reason, among others, that such contract is made unenforcible under Regulation G-9 of the Forest Regulations.

McFall v. Arkoosh, 215 Pac. 978 (Ida.).

Third. Under the facts of this case, if a cause of action at law were properly stated, Equity Rule 22 would not apply.

The motion to dismiss was granted by the court on July 22, 1936. The appellant waited until October 14, 1936, before taking any action whatever and then elected to stand upon his pleadings. During the interim, he made no request that the action be transferred to the law side of the court. Only after he elected to stand upon his pleadings, the order of dismissal was entered. It is, therefore, manifest that it was his desire to pursue the action in equity for specific performance, and that he did not intend to waive his equitable rights and substitute therefor an action in law for damages only. If the District Court had, of its own volition, transferred the action from equity to law, which, under the circumstances of this case would have been against the will of the appellant, he would have been deprived of a substantive right, to-wit, the right to have the court determine whether he is entitled to specific performance. This comes under the rule stated in the case of *American Land Co. v. City of Keene,* 41 Fed. (2d) 484 (First Circuit):

> "Even if it were proper under Section 274a of the Judicial Code and the equity rules for the case to be transferred to the law side and tried under new pleadings, the plaintiff has made no such request, preferring to rely for its relief on the equity side of the court. This court will not compel a litigant to transfer its action from equity to law or vice versa against its will. Fay v. Hill CCA 249 Fed. 415; Mobile Shipbuilding & Structural Co. v. Federal Bridge & Structural Co. CCA 280 F. 292, 295; Proctor & Gamble Co. v. Powelson, CCA 288 F. 299, 307."

The appellees recognize that as to the rule above stated in *American Land Co. v. City of Keene,* supra, there is a difference of opinion in the various circuits of the Federal Courts and that the cases cited by the appellant in his brief seem to support an interpretation of rule 22 that compels the court to transfer a cause from the equity to the law side of the court in instances where the action as pleaded should properly have been brought at law and not in equity. We submit, however, that, under the circumstances of this case, where the appellant not only failed to request a transfer of the case to the law side, which he had ample opportunity to do, but specifically rested upon his pleadings, and, in so doing, in effect expressed to the court his wish to have his right of specific performance tested in the Appellate Court, the rule as enunciated in the case of *American Land Co. v. City of Keene,* supra, is particularly applicable and sound and should be applied.

The appellant in this case is seeking specific performance of the alleged contract. It is true that he had an alternate prayer for damages. The effect of such a situation is passed upon specifically by a recent case in the Fifth Circuit entitled *Rushing et al. v. Mayfield Co. et al.,* 62 F. (2d) 318. In that case there was similarly a suit for specific performance and an alternate prayer for damages. The bill was dismissed by the court upon motion, and the question of whether the case should have been transferred to the law side was considered at length by the court at page 320 of its opinion. It was there said:

"The suit is one for specific performance brought in a federal court of equity. The attempt to join as an alternative relief a prayer to recover damages as at law for breach of contract cannot be recognized as proper equity practice. Nor does it render the whole suit one that ought originally to have been brought at law which is to be transferred to the law docket under Equity Rule 22 (28 U.S.C.A.-S 723) or 28 U.S.C.A.-S 397. The court of equity was called on to test the validity of the equity suit by a motion to dismiss on the merits, and dismissed it for want of equity. We approve this action expressing no opinion as to what, if any, relief, the appellant may have at law."

We, therefore, respectfully submit that the court properly granted the motion to dismiss and properly entered its order of dismissal of the action.

Dated, Flagstaff, Arizona,
April 14, 1937.

Respectfully submitted,
JAMES E. BABBITT,
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C. B. WILSON,
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No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a Corporation, BABBITT BROTHERS TRADING COMPANY, a Corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a Corporation, and H. V. WATSON,

Appellees.

APPELLANT'S REPLY BRIEF

NORRIS & PATTERSON,
W. E. PATTERSON,

STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
Attorneys for Appellant.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

No. 8433

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Appellees.

REPLY BRIEF

With respect to Proposition I of our opening brief ("The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged") all contentions of the appellees but one have been considered in our opening brief. We consider here only the contention of appellees that appellant

has been guilty of laches, and the effect thereof is not cured by a general allegation of fraud.

We respectfully submit that the allegations of the complaint do not disclose laches on the part of the appellant. As admitted by appellees (p. 20 appellees' brief) the amended bill of complaint does not disclose the exact date of the breach of the contract by appellees. Consequently there can be no showing of undue delay. It does appear that after discovery of the breach appellant sought to procure performance of the contract by appellees without the necessity of an action. Such conduct is not laches.

The purpose of the doctrine of laches is to promote not to defeat justice, and the applicability of the doctrine depends upon the circumstances of each case.

Kansas City Southern R. Co. v. May, 2 Fed. 2d 680.

> "The test is not time, but whether the situation of the parties is so changed as to render prosecution of a suit inequitable, and this test has been adopted by a majority of the courts dealing with the subject."

Mason v. McFadden, 298 Fed. 384, 391.

Kansas City Southern R. Co. v. May, supra.

In their argument under Proposition II ("If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side and not dismissed") appellees have pre-

sented some contentions not considered in our opening brief and to which we now reply.

It is first contended by the appellees that the amended bill of complaint does not state a cause of action because of the indefiniteness and uncertainty of the provisions of the contract as to the particular range rights to be relinquished and because there is no allegation that appellant at any time attempted to run or obtain the right to run 960 head of cattle.

There is no uncertainty as to the contract upon which the action is based. In paragraph V of the amended bill (p. 8 Tr. of Rec.) it is alleged that the defendants agreed to sell, and plaintiff to buy, the patented land and improvements of the defendants on the National Forest together with sufficient range rights to graze, run and maintain throughout the year not less than 960 head of cattle net, the sale of grazing rights to be by relinquishment. That plaintiff agreed to, and did, pay the defendants $2,830 for the patented land, $4,700 for the improvements, and $16 per head of cattle for which grazing rights were relinquished to appellant. The fact that the location of the range rights to be relinquished was not described by metes and bounds does not in an action at law render the contract invalid for uncertainty. The appellees held certain range rights and agreed to relinquish a part thereof to appellant. Suppose the appellees had agreed to sell appellant 960 head of cattle and received payment therefor but delivered only 640, would it be held that the contract was void for uncertainty and appellant could not recover the money paid for the cattle not delivered

because the contract of sale did not specifically describe by color, etc., each of the cattle sold? The situation here is identical.

And in paragraph VIII of the Amended Bill *it is alleged* that appellant attempted to obtain the right to run 960 head of cattle, and was refused.

Second, appellees contend that the contract is illegal and void because prohibited by Regulation G-9 of the Forest Regulations.

Regulation G-9 prohibits the sale of a *permit* for a valuable consideration. Regulation G-9, however, expressly provides for the transfer, by means of relinquishment of preference rights, of permits to purchases of permitted stock or the dependent, commensurate ranch property of an established permittee. Where such transfer is a part of a bona fide sale of the permitted stock or commensurate ranch property it is within the express provisions of Regulation G-9. Appellant purchased under a bona fide sale the ranch property and improvements of the defendants together with a relinquishment of range rights by appellee sufficient to graze 960 head of cattle. Appellees performed the contract to the extent of relinquishing range rights sufficient to graze 640 head of cattle and *this was approved by the Forestry Service.* What better interpretation of the Forest Regulations than that of the Forestry Service itself? (See paragraphs VIII and IX Amended Bill--p. 10 and 11, Tr. of Rec.)

Third, and finally, appellees contend that "under the facts in the case, if an action at law were properly stated, Equity Rule 22 would not apply."

The substance of the contention of the appellees here seems to be that no request on the part of the appellant that the cause be transferred to the law side of the court appears in the record and, therefore, this appellant having elected to stand upon his pleading the question of the duty to transfer the cause to the law side cannot now be presented.

In this the appellees overlook the first ground of their motion to dismiss, to-wit:

> "That the amended bill of complaint does not state facts sufficient to constitute a valid cause of action *at law* or in equity against said defendants or against any of them." (Italics ours.) (Tr. of Rec., p. 14).

Thus the sufficiency of the amended bill to present a cause of action *at law* was directly raised by the motion of appellees to dismiss, and presumably was considered and passed upon by the court in ruling on said motion.

In *American Land Co. v. City of Keem,* 41 Fed. 2d 484, cited by appellees, will be found a very well reasoned dissenting opinion.

As shown by the cases cited in our opening brief the question has been determined by this Court adversely to appellees' contention.

In conclusion, the Court will, of course, recognize that appellees' argument as to laches can have no application to the action at law. No statute of limitations is pleaded, nor does it appear that any statute of limitations has run.

Respectfully submitted,

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No. 8433

IN THE

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Appellees.

APPELLANT'S PETITION FOR REHEARING

NORRIS & PATTERSON,
W. E. PATTERSON,

STROUSS & SALMON,
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THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

No. 8433

IN THE

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Appellees.

PETITION FOR REHEARING

To the United States Circuit Court of Appeals for the Ninth Circuit and the Honorable Judges Thereof:

Comes now C. D. Bell, the appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That there is manifest error, inadvertently arrived at, in the opinion and decision of this Court in this cause in that:

(a) The opinion and decision of the Court denies to appellant his appeal upon material matters, reserved and presented by the assignments of error herein.

(b) That the opinion and decision of the Court disregards, and fails to consider or determine, material matters or questions of error duly reserved and assigned as error herein, and thereby denies to appellant his appeal thereon.

(c) Although presented by the assignments of error, the question of the sufficiency of the complaint to state a cause of action *at law* was disregarded, and not considered or determined by the opinion or decision of the Court, thus denying to appellant his appeal thereon.

WHEREFORE, upon the foregoing grounds, appellant respectfully urges that this petition for rehearing be granted, and that the decree of the District Court be upon further consideration reversed.

Respectfully presented,

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W. E. PATTERSON,
First National Bank Bldg.,
Prescott, Arizona
STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
703 Heard Building,
Phoenix, Arizona.
Attorneys for Appellant.

I, Charles L. Strouss, of counsel for the above named C. D. Bell, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

CHARLES L. STROUSS,
Of Counsel for Appellant.

ARGUMENT

Under the assignments of error filed by the appellant, error was asserted and urged upon two grounds with respect to the granting of the motion to dismiss and the entering of the decree below, namely:

1. The Amended Bill of Complaint stated facts sufficient to constitute a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged, and it was error to dismiss the bill.

2. If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract, and the cause should have been transferred to the law side, and it was error to dismiss the bill.

See Assignments of Error, Transcript of Record, Pages 22-24.
Summary of Argument and Assignments of Error, Appellant's Brief, Pages 5-7.

The Court's opinion and decision considered the first proposition only, entirely disregarding the second proposition.

The last paragraph of the opinion and decision of the Court reads:

> "So many of the elements involved are so indefinite and uncertain that the lower court properly held that *the facts stated did not entitle appellant to a decree of specific performance.*" (Italics ours).

From this it is apparent that the Court has considered and determined *only* the sufficiency of the facts stated in the bill to entitle appellant to a *decree of specific performance*. No consideration is given to or decision made upon the error, duly and properly assigned, predicated upon the proposition that if equity jurisdiction is wanting the bill stated facts sufficient to constitute an action at law for damages requiring the cause to be transferred to the law side, and it was error to dismiss.

This proposition was asserted and urged by appellant, both in his briefs and on oral argument.

See Appellant's Brief, Pages 12-15.
Appellant's Reply Brief, Pages 2-6.

We respectfully submit that the effect of the Court's failure to consider and determine this Assignment of Error predicated upon the sufficiency of the facts stated in the bill to constitute a cause of action at law is to deny the appellant his appeal and hearing thereon.

In the Court's opinion it is stated:

> "Appellant entered into possession of the relinquished areas and he was not distrubed in any of his asserted rights until October, 1933, which is the date he alleges to have first discovered that any of his actual or supposed rights were to be curtailed."

We submit that the allegations of the bill of complaint do not support this statement. On the contrary, the allegation of the complaint is that "* * * said defend-

ants did in fact relinquish, and said Forest Service did allot to plaintiff, range and area sufficient to graze, run, and maintain not more than 640 head of cattle * * *" (top Page 11, Transcript of Record.) In other words, appellant never entered into possession of range sufficient to graze or run more than 640 head of cattle.

It is also stated in the Court's opinion: (Page 5)

> "The allegation is not that the appellees failed to waive a preference to graze 960 head of cattle covered by their permit but that they pretended to and that the relinquishment for 960 head was reduced to 640 by the Forest Service which had the authority so to do.
>
> "Appellant's argument is equivalent to the contention that the contract required appellees, for an indefinite future time, to relinquish from their grazing rights whatever amount might be necessary at various times to supply area sufficient for appellant to graze 960 head of cattle. * * *"

These statements, we submit, are not correct statements either as to the allegations of the bill or as to appellant's argument.

The allegations of the bill are that appellees pretended to relinquish range sufficient to run 960 head of cattle but that said appellees did in fact relinquish "range and area sufficient to graze, run and maintain not more than 640 head of cattle." In other words, the allegations of the bill are that the appellees failed to relin-

quish range or area sufficient to graze 960 head of cattle.

And the reason alleged is that prior to the making of the contract with appellant, the appellees had been informed by the Forest Service that appellees would be required to reduce their grazing rights under their permit, and appellees knew that, unless such reduction was absorbed by appellees from range rights retained by appellees "* * * the requirements of said Forest Service would extend and effect the relinquishment of range for the grazing and running of 960 head of cattle to be acquired by plaintiff pursuant to said contract * * *" (Page 9, Transcript of Record.)

Nor does appellant *contend* "that the contract required appellees, for an indefinite future time, to relinquish from their grazing rights whatever amount might be necessary at various times to supply area sufficient for appellant to graze 960 head of cattle." (Court's opinion, Page 5). The appellant contends that the relinquishment by the appellees, which purported to be for 960 head of cattle, was, by reason of the prior notice from the Forest Service to appellees of a required reduction in appellees' grazing permit and the concealment thereof by the appellees from appellant, a relinquishment for 640 head of cattle only. Appellant is not complaining of a reduction by the Forest Service of the range rights *relinquished to appellant.* Such is not the case stated. Under the Forest Service regulations such reduction could not exceed 20 per cent of the range right transferred. (See Appendix, Appellant's

Brief, Pages 23, 27 and 28.) Here the reduction equals one-third of the rights contracted to be relinquished.

Here the complaint is that, unknown to and concealed from appellant prior to the execution of the contract by appellee, the Forest Service had notified appellees of a required reduction of *appellees' permit* to graze 3174 head of cattle. The reduction of 320 head constitutes slightly over a 10 per cent reduction of appellees' total range rights. That because of such reduction and the requirements of the Forest Service appellees' purported relinquishment for 960 head of cattle was and could be effective as a relinquishment to appellant of range and area sufficient to graze only 640 head of cattle. To the extent of range rights for 320 head of cattle it constituted merely a relinquishment to the Forest Service of *the amount of the required reduction of appellees total range rights.*

To summarize, the appellant contends that the contract required the appellees to deliver relinquishments at the time of delivery, effective to relinquish *to appellant* range rights to graze 960 head of cattle and that appellees have breached their contract in that regard to appellant's damage in the sum of $5,120.

We have heretofore in Appellant's Brief and in Appellant's Reply Brief presented our contentions concerning the duty of the District Court to have trans-

ferred the cause to the law side. We will not here repeat but by reference incorporate here our argument in those briefs.

Respectfully submitted,

NORRIS & PATTERSON,
W. E. PATTERSON,
First National Bank Bldg.,
Prescott, Arizona.

STROUSS & SALMON,
CHARLES L. STROUSS,
RINEY B. SALMON,
703 Heard Building,
Phoenix, Arizona.
Attorneys for Appellant.

No. 8450

United States

Circuit Court of Appeals

For the Ninth Circuit.

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of LORENZO N. WINSLOW, Deceased,

Appellants,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8450

United States

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES.

Attorneys for Appellants:

H. C. NELSON, Esq.

Eureka, Calif.

Attorneys for Appellee:

F. ELDRED BOLAND, Esq.

KNIGHT, BOLAND & RIORDAN,

San Francisco, Calif.

In the Superior Court of the State of California in and for the County of Humboldt.

No. 16399.

LORENZO N. WINSLOW and ANNIE E. WINSLOW,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Defendant.

ORDER REMOVING CAUSE TO UNITED STATES DISTRICT COURT.

The above-entitled action coming on for hearing upon the petition of The Mutual Life Insurance Company of New York, a corporation, the defendant herein, for an order removing said action to the District Court of the United States, for the Northern District of California, Northern Division, and it appearing to the court that said defendant has

filed its petition for such removal in due form, within the time required by law; that defendant has filed with said petition its bond duly conditioned as required by law, and that the notice required by law of the filing of said petition and bond had, prior to the filing thereof, been served upon plaintiff herein, which notice the court finds was sufficient and in accordance with the requirements of the statutes so provided; and it further appearing that this is a proper cause for removal to the United States District Court, this court does now

ORDER that said petition and bond be and the same are hereby accepted and approved; that this cause be removed to the District Court of the United States, for the Northern District of California, Northern Division, pursuant to sections [1*] 28 and 29 of the Judicial Code of the United States; that all other proceedings in this cause be stayed, and that the Clerk of this Court be and said Clerk is hereby directed to make up, forthwith, the record in said cause for transmission to said United States District Court, in conformance with the statutes so provided.

Dated, July 26th, 1935.

HARRY W. FALK
Judge of the Superior Court of the State of California, in and for the County of Humboldt.

[Endorsed]: Filed July 26, 1935. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court, Northern District of California, Northern Division.

On Removal #1330S.

LORENZO N. WINSLOW and ANNIE E. WINSLOW,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Defendant.

NOTICE OF REMOVAL OF CAUSE AND FILING OF RECORD IN UNITED STATES DISTRICT COURT.

To the Plaintiffs Above Named and to H. C. NELSON, Esq., Their Attorney:

YOU AND EACH OF YOU will please take notice that on the 26th day of July, 1935, by an order of the Superior Court of the State of California in and for the County of Humboldt, the above entitled cause was duly removed from said Court to the District Court of the United States for the Northern District of California, Northern Division, and a certified transcript of the record in said cause was filed in said District Court of the United States [3] on the 1st day of August, 1935.

Dated this 3rd day of August, 1935.

F. ELDRED BOLAND
KNIGHT, BOLAND & RIORDAN
Attorneys for Defendant.

Due service and receipt of a copy of the within Notice of Removal of Cause and Filing of Record in the United States District Court is hereby admitted this 7th day of August, 1935.

H. C. NELSON

Attorneys for Plaintiffs

[Endorsed]: Filed Aug. 9, 1935. [4]

[Title of Court and Cause.]

AMENDED COMPLAINT.

Leave of Court being first had, plaintiffs herein file this their Amended Complaint, and for cause of action allege:

I.

That plaintiff Annie E. Winslow at all times herein mentioned was the mother of Leonard N. Winslow. That Lorenzo N. Winslow was the father of said Leonard N. Winslow, and the said Lorenzo N. Winslow died intestate in the County of Humboldt, State of California, on the 3rd day of July, 1935, and at said time was a resident of the said County of Humboldt; that upon proceedings duly and regularly had in the Superior Court of the State of California, in and for the County of Humboldt, the said Annie E. Winslow was on the 26th day of July, 1935, duly appointed Administratrix of the estate of said Lorenzo N. Winslow, Deceased, and thereafter, and upon the 26th day of July,

1935, qualified as such Administratrix, and ever since said time has been and now is the duly appointed, qualified and acting Administratrix of the [5] estate of said Lorenzo N. Winslow, Deceased.

II.

That the defendant The Mutual Life Insurance Company of New York is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and authorized to do a life insurance business in the State of California.

III.

That the said plaintiffs are informed and believe, and upon such information and belief allege that on or about the 14th day of December, 1934, the said defendant at and in the City of Eureka, County of Humboldt, State of California, by and through its agent, Fred J. Moore, who was then and there the duly authorized agent for the said defendant to enter into contracts for life insurance on behalf of said defendant, as hereinafter set forth, in consideration of the sum of $100.00, then and there paid to said agent for and on account of said defendant, by said Leonard N. Winslow, and the agreement of said insured to pay the balance of said premium, namely: $153.50, did then and there orally agree to and did then and there insure the life of the said Leonard N. Winslow, for the sum of $5,000.00, payable to said plaintiffs or their survivor, in equal

shares, as beneficiaries, upon the death of said Leonard N. Winslow, and with double indemnity payable to said plaintiffs as such beneficiaries, in the event of death of said insured, caused by accidental means, and did then and there agree to issue and deliver to said Leonard N. Winslow its written policy of life insurance upon his said life for the said sums above mentioned, payable to said plaintiffs as beneficiaries; that the balance of the premium due to be paid on account of said policy of life insurance when issued, was [6] $153.50, which said amount said insured did then and there agree to pay, and which said amount said plaintiffs have heretofore tendered to said defendant, but which said amount said defendant has refused to accept.

IV.

That the said Leonard N. Winslow died on the 18th day of December, 1934, in the City of Eureka, County of Humboldt, State of California, as the result of injuries received from violent external and accidental means, occurring after the making of said oral agreement of insurance, as aforesaid; and the sum of $10,000.00 on account of said contract of life insurance, as aforesaid, then and there became and is now due and owing to plaintiffs from said defendant.

V.

That plaintiffs are informed and believe, and upon such information and belief allege that pursuant to said agreement as aforesaid, a policy has

been issued upon the life of said Leonard N. Winslow, by said defendant company.

VI.

That plaintiffs have demanded of defendant the said policy in accordance with said oral contract, and have demanded the payment of the said sum of $10,000.00, but the said defendant has refused to deliver such policy to the plaintiffs, and has refused to pay the said sum of $10,000.00 or any part thereof, and still retains the $100.00 paid to said defendant by said Leonard N. Winslow.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth. [7]

For a further, separate and second cause of action, said plaintiffs complain of defendant, and for cause of action allege:

I.

Said plaintiffs hereby refer to Paragraphs I and II of the first cause of action herein, and specifically make the same a part hereof.

III.

That said plaintiffs are informed and believe, and upon such information and belief allege that on or about the 14th day of December, 1934, the said defendant The Mutual Life Insurance Company of New York, by and through its agent, Fred J. Moore, who was then and there duly authorized, at and in the City of Eureka, County of Humboldt, State of California, solicited and requested the said Leon-

ard N. Winslow to take out insurance with said defendant in the form of a twenty year endowment policy on the life of said Leonard N. Winslow, in the sum of $5,000.00, and payable to said plaintiffs herein as beneficiaries, with double indemnity in the event of the death of said Leonard N. Winslow, by reason of external injuries arising from accidental means; that the said defendant by and through its said agent did then and there inform and discuss with said Leonard N. Winslow of the advantages of putting said life insurance into effect immediately and the said Leonard N. Winslow did then and there state and agree with said agent, that said life insurance should and was intended by him to become effective immediately and did then and there offer to pay the quarterly premium that would be due upon the amount of such policy, to make the same effective immediately; that the said defendant by and through its said agent, instead of accepting said quarterly premium, induced and persuaded the said [8] Leonard N. Winslow to pay to said defendant the sum of $100.00 on account of said premium due on said insurance, which sum was more than the amount of the quarterly premium due on said policy, which said sum said insured did then and there pay to said defendant and said insured did also then and there, and as part of said transaction agree to pay the balance of said premium, namely $153.50 to said defendant, or its duly authorized agent. That at the time the said Leonard N. Winslow paid the said sum of $100.00 and agreed

to pay said premium, or the balance thereof to the said defendant as aforesaid, he believed and was reasonably led, caused, allowed and permitted to believe by said defendant and its agent as aforesaid, that the said insurance would become effective immediately and remain so, as long as the annual premiums stated were paid as agreed upon; and said insured would not have paid said $100.00 to defendant, nor have agreed to pay said balance of premium had he not then and there believed and understood that said insurance upon his life as aforesaid was effective immediately. That the said defendant and its said agent did then and there represent and state to said Leonard N. Winslow that by paying the premiums annually instead of quarterly, the said insured would save six percent of such annual premium; that the moneys paid to said defendant, towit: the sum of $100.00 was in excess of the amount of the quarterly premium upon said policy, and it was then and there understood, agreed and believed by and between said Leonard N. Winslow, and the said agent of said defendant that said insurance became and was effective, as of the date and time of making said payment of $100.00 as aforesaid; that the said defendant by and through *it* said agent, at said time and place produced a form of application upon which were certain questions and spaces [9] for answers of applicant, that said agent did then and there write in the answers made by said Leonard N.

Winslow to such questions, as were then asked said applicant, and did thereupon

That said agent, through inadvertance, neglect or mistake, then and there and thereafter failed to insert in said application blank the fact that the said amount of $100.00 had been so paid to said agent, and so failed to give the form of receipt referred to in said application blank; but did give said applicant a receipt for said $100.00, and did advise and cause said applicant to believe that said receipt was in form and sufficient for the purpose of making said life insurance effective from date thereof; that said agent did then and there fail and neglect to have said applicant read or sign the upper half of said application at the place provided therefore, and said agent thereupon sent said applicant to the medical examiner at Eureka, California; that thereupon, and on December 14, 1934, said applicant submitted to a medical examination for life insurance, which said medical examination was favorable to said applicant. That said agent on December 14, 1934, caused said application to be forwarded to the San Francisco office of said defendant, and the said office did return the upper half of said application to said agent at Eureka, California, for applicant's signature; and the said agent thereafter and on December 17, 1934, did request said applicant to sign said upper half of said application at the place indicated by said agent, but without giving said applicant an opportunity to read the same or to observe whether said agent had

correctly, or at all filled in all blank spaces thereon; and said agent had at said time of securing the signature of applicant, through inadvent*a*nce, neglect or mistake, failed to insert in said application the amount that had been paid thereon as aforesaid, or that the or [10] any receipt had been given applicant therefor; and said applicant did on December 17, 1934, sign said application as submitted by said agent as aforesaid, without knowing, or being given a reasonable opportunity to know the contents thereof, and did then and there believe and was caused and advised, and led by said agent to believe that said life insurance had become effective from the date of payment of said $100.00, that said application contained full and correct statements of all facts required therein by said insurance company, and was the second application blank that said agent had previously, and on December 14, 1934, filled in as aforesaid, and that the signing thereof was simply a formal matter; that said applicant, under the guidance, direction and advice of said agent, did on his part, in all respects, comply with and fulfill, according to the advice and instructions so received, the requirements of the provisions in said application form set forth, for the purpose of making said insurance take effect upon the date of signing said application, and as of the age of twenty-three years; that said applicant did not at any time, have any knowledge or information as to said agent's authority to enter into any contracts for life insurance for or on behalf of said defend-

ant, except the statements and representations of said agent with reference thereto, as herein set forth; that said agent did send the $100.00 so paid to said defendant and said defendant did approve said application and issue a policy of life insurance thereon, dated as of November 20, 1934. That said balance due on said premium and as agreed to be paid by said applicant, namely: $153.50 was tendered to said defendant on February 11, 1935. [11]

That the said Leonard N. Winslow then and there and for a long time prior thereto knew that said agent had represented and did represent said defendant in said County of Humboldt, in the matter of issuing life insurance coverages and policies and the said Leonard N. Winslow had great trust and confidence in the said Fred J. Moore as said agent in the issuance of said life insurance and the making of contracts with reference thereto.

That the said agent Fred J. Moore then and there had both actual and ostensible authority to make said oral contract of insurance for and on behalf of said defendant, as aforesaid.

That by reason of the premises as aforesaid, said defendant is estopped to claim or assert that said agent then and there acted without or in excess of authority in causing or allowing said Leonard N. Winslow to believe that said insurance was effective immediately. That the said Leonard N. Winslow and the said defendant did then and there enter into an oral contract of insurance as aforesaid, for the principal sums and premiums hereinbefore stated.

IV.

That the said Leonard N. Winslow died on the 18th day of December, 1934, in the City of Eureka, County of Humboldt, State of California, as the result of injuries received from violent external and accidental means, occurring after the making of said oral agreement of insurance, as aforesaid; and the sum of $10,000.00 on account of said contract of life insurance, as aforesaid, then and there became due and owing to plaintiffs from said defendant. [12]

V.

That plaintiffs are informed and believe, and upon such information and belief allege that a policy of life insurance was issued by said defendant upon the life of said Leonard N. Winslow, in conformity with said oral agreement.

VI.

That plaintiffs have demanded of defendant the said policy in accordance with said oral contract, and have demanded the payment of the said sum of $10,000.00, but the said defendant has refused to deliver such policy to the plaintiffs, and has refused to pay the said sum of $10,000.00 or any part thereof, and still retains the $100.00 paid to said defendant by said Leonard N. Winslow.

WHEREFORE, Plaintiffs pray judgment against said defendant in the sum of Ten Thousand Dollars, together with such other and further relief as

to the Court may seem meet and proper, and also for costs incurred herein.

H. C. NELSON
Attorney for Plaintiffs. [13]

State of California,
County of Humboldt—ss.

ANNIE E. WINSLOW, being duly sworn deposes and says: That she is the plaintiff named in the foregoing Amended Complaint; that she has read said Amended Complaint and knows the contents thereof and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

ANNIE E. WINSLOW

Subscribed and sworn to before me this 18 day of May, 1936.

[Seal] H. C. NELSON
Notary Public in and for the County of Humboldt, State of California. [14]

[Title of Court and Cause.]

STIPULATION

It is hereby stipulated between the parties hereto and their respective counsel, that the attached amended complaint may be filed herein, and that the answer of the defendant to the original com-

plaint may be considered as and held to be defendant's answer to said amended complaint.

H. C. NELSON
Attorney for Plaintiffs.
F. ELDRED BOLAND
KNIGHT, BOLAND & RIORDAN
Attorneys for Defendant.

[Endorsed]: Filed May 25, 1936. [15]

[Title of Court and Cause.]

ANSWER

Comes now defendant and answers the first count of plaintiffs' complaint herein as follows:

I.

Defendant denies all the allegations contained in sections three, four, five and six of said first count in said complaint, except as follows:

Defendant alleges that on the 14th day of December, 1934, said Leonard N. Winslow made and signed and delivered to said Fred J. Moore (a solicitor for defendant) a written application for insurance upon his life, in the sum of $5,000.00, wherein and whereby said Leonard N. Winslow stipulated and agreed as follows: [16]

> "This application is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK herein called the Company. All the following statements and answers, and all those

that the Insured makes to the Company's Medical Examiner, as a part of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. (The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired.) The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided."

"It is agreed that in the event of the self-destruction of the Insured whether sane or insane during the first year following the date of issue of the policy hereby applied for the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the resident, a Vice-President, or a Secretary of the Company has power on behalf of the Com-

pany to bind the Company by making any promises respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

A true and correct copy of said application is hereto annexed, made a part hereof and marked "Exhibit A"; and will be relied upon by defendant upon the trial of the above-entitled action.

Defendant is informed and believes, and upon such information and belief alleges, that said Leonard N. Winslow died on the 18th day of December, 1934, before said application was received by defendant from said Fred J. Moore. The annual premium to be paid by said Leonard N. Winslow, in consideration of the issuance of the policy so applied for, amounted to the [17] sum of $253.50, and at the time of making said application said Leonard N. Winslow paid to said Fred J. Moore the sum of $100.00, and no more, and which said sum of $100.00 was immediately after the death of said Leonard N. Winslow tendered to plaintiffs herein and was rejected by them; and defendant hereby tenders and offers to pay to plaintiffs said sum of $100.00. No policy of insurance was ever issued by defendant upon said application, nor was said application ever accepted by defendant.

Said Fred J. Moore never at any time had any authority or power, actual or ostensible, to make any contract or agreement of any kind on behalf of defendant, and no conditional receipt was ever executed or delivered by defendant, or by any one for it or on its behalf.

Comes now defendant and answers the second count of plaintiff's complaint herein as follows:

I.

Defendant denies all the allegations contained in sections three, four, five and six of said second count in said complaint, except as follows:

Defendant alleges that on the 14th day of December, 1934, said Leonard N. Winslow made and signed and delivered to said Fred J. Moore (a solicitor for defendant) a written application for insurance upon his life, in the sum of $5,000.00, wherein and whereby said Leonard N. Winslow stipulated and agreed as follows:

> "This application is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK herein called the Company. All the following statements and answers, and all those that the Insured makes to the Company's Medical Examiner, as a part of this application, are true, and are offered to the Company as an inducement [18] to issue the proposed policy. (The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any

physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired.) The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided."

"It is agreed that in the event of the self-destruction of the Insured whether sane or insane during the first year following the date of issue of the policy hereby applied for the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the President, a Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promises respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements."

A true and correct copy of said application is hereto annexed, made a part hereof and marked "Exhibit A"; and will be relied upon by defendant upon the trial of the above-entitled action.

Defendant is informed and believes, and upon such information and belief alleges, that said Leonard N. Winslow died on the 18th day of December, 1934, before said application was received by defendant from said Fred J. Moore. The annual premium to be paid by said Leonard N. Winslow, in consideration of the issuance of the policy so applied for, amounted to the sum of $253.50, and at the time of making said application said Leonard N. Winslow paid to said Fred J. Moore the sum of $100.00, and no more, and which said sum of $100.00 was immediately after the death of said Leonard N. Winslow tendered to plaintiffs [19] herein and was rejected by them; and defendant hereby tenders and offers to pay to plaintiffs said sum of $100.00. No policy of insurance was ever issued by defendant upon said application, nor was said application ever accepted by defendant. Said Fred J. Moore never at any time had any authority or power, actual or ostensible, to make any contract or agreement of any kind on behalf of defendant, and no conditional receipt was ever executed or delivered by defendant, or by any one for it or on its behalf.

WHEREFORE, defendant prays to be hence dismissed with its costs.

F. ELDRED BOLAND
KNIGHT, BOLAND & RIORDAN
Attorneys for Defendant. [20]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

F. Eldred Boland, being first duly sworn says:

That he is the attorney for The Mutual Life Insurance Company of New York, a corporation, defendant in the within action; that there is no officer of said defendant corporation within the City and County of San Francisco, State of California, where affiant has his office, and that for that reason affiant makes this affidavit on its behalf.

That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters stated therein on information or belief, and as to such matters that he believes it to be true.

F. ELDRED BOLAND

Subscribed and sworn to before me this 21st day of August, 1935.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 22, 1935. [21]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled case, find in favor of the defendant.

PAUL WILLIAMSON

Foreman

Dated: July 30, 1936.

[Endorsed]: Filed at 10:45 a. m., July 30, 1936. [22]

In the Northern Division of the United States District Court in and for the Northern District of California.

No. 1330-L

ANNIE E. WINSLOW, and ANNIE E. WINSLOW as Administratrix of the Estate of Lorenzo N. Winslow, deceased,

Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Defendant.

JUDGMENT

This case having come on regularly for trial on the 29th day of July, 1936, being a day in the April 1936 Term of said Northern Division of said Court, before the Court and a Jury of twelve men duly im-

paneled and sworn to try the issues joined herein, Hans Nelson, Esq., appearing as Attorney for the Plaintiff, and J. Eldred Boland, Esq., appearing as Attorney for the Defendant; the trial having been proceeded with on the 29th and 30th days of July, 1936, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after argument of the Attorneys and the instructions of the Court having been submitted to the Jury, and the Jury having subsequently rendered the following verdict, which was Ordered recorded, to-wit:

"We, the jury in the above entitled case, find in favor of the defendant.

PAUL WILLIAMSON,
Foreman,"

and the Court having Ordered that Judgment be entered in accordance with said verdict;

WHEREFORE, by virtue of law and by reason of the premises aforesaid,

IT IS THEREFORE ORDERED AND ADJUDGED that Judgment be entered herein in favor of the defendant.

ENTERED this 30th day of July, 1936.

WALTER B. MALING,
Clerk.

By F. M. LAMPERT
Deputy Clerk. [23]

PETITION FOR APPEAL.

To the Honorable Judge of the above named Court:

The undersigned, plaintiffs and appellants, conceding themselves aggrieved by the Order of the Court herein, granting the Motion of said defendant for a directed verdict in favor of said defendant, and also by the verdict of the Jury in said cause, in favor of said defendant, and also the Judgment rendered in favor of said defendant in said cause, all made on July 30, 1936, hereby appeal from said Order, Verdict and Judgment, and each of them, and pray that said appeal be allowed, and that Citation be issued as provided by law; that any necessary bond be fixed, and that a transcript of record, proceedings, exhibits and documents upon which said Order, Verdict and Judgment, and each of them, were based, duly authenticated, be sent to the United States Circuit Court of Appeals of the Ninth Circuit, under the laws and rules of said Court in such cases made and provided.

Dated: Eureka, California, September 16, 1936.

H. C. NELSON

Attorney for Appellants. [24]

United States of America
Northern District of California
Northern Division—ss.

ANNIE E. WINSLOW, being first duly sworn, deposes and says: That she is one of the petitioners named in the foregoing Petition; that she has read said Petition for Appeal and knows the contents

thereof; that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters she believes it to be true.

ANNIE E. WINSLOW

Subscribed and sworn to before me this 16th day of September, 1936.

[Seal] H. C. NELSON

Notary Public in and for the County of Humboldt, State of California.

[Endorsed]: Filed Sept. 25, 1936. [25]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the appellants herein, Annie E. Winslow, and Annie E. Winslow as Administratrix of the Estate of Lorenzo N. Winslow, Deceased, and file the following errors on appeal from the Order of said Court made and entered herein on July 30, 1936, granting the Motion of said defendant for a directed verdict in favor of said defendant; also from the Verdict of the Jury in said cause, returned on said date in favor of said defendant, and also from the Judgment rendered in said cause on said date, in favor of said defendant, which said errors render erroneous the said Order, Verdict, and Judgment, and upon which they rely for a reversal thereof, to-wit:

1. That said Court erred in granting the Motion of said defendant for a directed verdict in favor of said defendant.

2. That said Court erred in directing said Jury in said cause to render a verdict in favor of said defendant.

3. That said Court erred in directing that Judgment be entered upon said directed verdict in favor of said defendant.

Dated: September 16, 1936.

H. C. NELSON

Attorney for Appellants

[Endorsed]: Filed Sept. 25, 1936. [26]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On motion of H. C. Nelson, Esq., attorney for plaintiffs and appellants, above named:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order granting the motion of said defendant for a directed verdict, also from the directed verdict in favor of said defendant in said cause, and also from the Judgment entered upon said directed verdict, all made, rendered and entered on July 30, 1936, be and the same is hereby allowed; and that a transcript, duly authenticated of the records and proceedings upon which said

Order, Verdict and Judgment, and each of them were based, be forthwith transmitted to the United States Circuit Court of Appeal for the Ninth Circuit in the manner and time prescribed by law.

AND IT IS FURTHER ORDERED that the bond for costs on appeal to be given by said appellants be and the same is hereby fixed at the sum of Two Hundred Fifty ($250.00) Dollars.

Dated: September 25th, 1936.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Sept. 25, 1936. [27]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that afterward, to-wit: On the 29th day of July, 1936, at the Courtroom of the United States District Court for the Northern Division of the Northern District of California, in the Federal Building at Eureka, California, the above entitled matter came on regularly for hearing before the Honorable HAROLD LOUDERBACK, Judge of said Court, and before a Jury, duly called, selected, impaneled and sworn; the plaintiffs being represented by H. C. NELSON, Esq., as their attorney, and defendant being represented by KNIGHT, BOLAND & RIORDAN, Esqs., and F. ELDRED BOLAND, Esq., its attorneys; and thereupon the following proceedings were had:

Counsel for plaintiffs moved the Court for permission to have the Clerk strike out on the face of the Amended Complaint the word "oral" appearing on page 8, line 9 in the second cause of action; also the word "oral" on line 16 of the same page [28] and the word "oral" on line 24 of the same page, and the word "oral" on line 5 of page 9, and line 8, page 9.

The COURT: I don't think there will be any objection to that.

Mr. BOLAND: No.

The COURT: Such will be the ruling.

Mr. NELSON: It was admitted in this case if the plaintiff was entitled to recover at all it would be for the face of the policy of $10,000—$5000 double indemnity on acount of the death of Leonard Winslow, who was killed while riding on a fire truck colliding with another privately operated truck on the streets of this city on the 19th or the 20th day of December, so if there is any liability at all it is double indemnity.

The COURT: Is that conceded?

Mr. BOLAND: Yes.

Thereupon the plaintiffs offered testimony as follows:

Testimony of

FRED J. MOORE

My name is Fred J. Moore. I live in the City of Eureka, and have lived in Eureka for sixteen years. During that entire time I have been with the

(Testimony of Fred J. Moore.)

Mutual Life Insurance Company of New York, as their representative, and still am their representative. My territory covers the Counties of Humboldt and Del Norte. I have a written contract of employment with that Insurance Company, and have been acting under that contract and the contract has been renewed from time to time and amended, due to certain changes of Company policy.

I knew Leonard Winslow very well. I wrote a policy for Leonard on the 10th day of May, 1926. At that time he was fifteen years of age. That policy was in effect up until the time of his death. It was a double indemnity policy for $2,000 face [29] amount, and the claim paid was something in excess of $4,000. I also knew his parents very well. I had issued policies of life insurance through my Company to the other male members of the family, that is, the father had a policy previous to my coming with the Company, which matured during my time with them, and I delivered his maturity check; then after writing Leonard a policy I wrote his younger brother Paul a policy. I am also very well acquainted with Mrs. Winslow.

I recall going to see Leonard about additional insurance in the latter part of 1934.

I interviewed him in his office in the City Hall, urging him to increase his insurance as a young man. He had previously sent in a card to our company in answering an advertisement they sent out, showing the benefits to be derived from retirement

(Testimony of Fred J. Moore.)

plan, so I talked to Leonard in his office, and while he agreed with my presentation, he wanted to put it off. Wanted to think about it. I talked long enough to satisfy myself I could do nothing with him at that time, and then later I saw him at his work, down, I would say, at the intersection of Murray Street and Broadway, when he was doing some electrical work there, and his talk was still favorable, but no action. On Friday morning, December 14th, I was going to the court house, and I met Leonard at the intersection of Fourth and I. He was on the opposite side of the street. I stopped him and asked him to come to my car and suggested now was the time to take life insurance, and he replied in effect he was too busy to talk to me. It was during the Christmas holidays, and he was busy doing electrical work with the Christmas decorations, and he had no time. Then I said something to him to the effect that now is all he had—"If you are ever going to take it why put it off?" And he replied in effect [30] he would take a policy with me after the first of that year; he did not have money enough then—he was going to San Francisco, and wanted to have some extra money. I said, "You have money enough to start this. If you go to San Francisco with a large sum of money in your pocket you might spend more than if you didn't take so much with you." So I suggested that he start the thing on that particular day, make a deposit to me,

(Testimony of Fred J. Moore.)

which would leave him with much less after the first of the year, and he would have the knowledge he started his insurance before the first of the year, and it was more valuable to have it than be thinking about getting it. I went to the court house, and before going I had arranged with him to go home for his bank book. He agreed, at my suggestion, to give me a deposit of $100. He went to the Bank of Eureka during the time I was in the court house, and I was delayed there actually longer than I anticipated, and he was very anxious to get away; but I prevailed on him to go to Dr. E. J. Hill with me for examination. The thing was done so quickly that I wanted Leonard to get back to work as soon as possible, which he was anxious to do, and stating it had taken longer than what I had told him when I first stopped him, and in the rush to get him back to work I had let him go in for his medical examination, and I had failed to have Leonard sign his name to the application concerning my part as agent. Our form is all in one blank. As agent I ask the applicant certain questions, and he takes it to the doctor for completion, and the doctor sends it to our San Francisco office. Our San Francisco office received it the following day—I believe that would be December 15th, on Saturday. On Sunday, December 16th, I received back from San Francisco the upper half of the application, calling my attention that I had [31] inadvertently failed to have the applicant sign the application, and asking that I get his signature,

(Testimony of Fred J. Moore.)

which I did, on Monday, December 17th. I mailed that back to San Francisco on Monday, December 17th, and it reached our office on Tuesday, December 18th, and Leonard Winslow was killed Tuesday night, I think, approximately 7:30. I notified our office Wednesday morning, December 19th, by telegram, to this effect, and our cashier, Mr. Murray, called me immediately concerning the case, and asked what the circumstances were surrounding it. I told him Leonard had paid me $100 in currency, for which I had given him a receipt for that amount. Sometime after that, in connection with the former policy containing a double indemnity clause, our inspector came here, who works directly under the home office at New York, to satisfy himself as to the liability of the company, and the accidental feature, and at my suggestion I had this inspector go to the bank to verify that he had received $100. which would correspond with the receipt that Leonard's parents found after his death. Now, Leonard had full confidence in me.

It was on December 14th that I finally came to an understanding with him about the issuance of this policy. At that time I had an application form with me to be filled in, in connection with this application.

The document handed to me is the original document, the exact paper that I had that day.

The writing in black ink that appears upon the face of the application above the name "Leonard Nathan Winslow"; was written by me. In fact, all the writing that appears on the upper half of

(Testimony of Fred J. Moore.)

that application is in my hand-writing, with the exception of Leonard Winslow's signature. I asked him on that day, December 14, 1934, to sign at the place where the signature appears on the [32] upper half. The pasting on the face of the application is due to the fact that his signature was signed after the office returned that form. When I sent the application down, Leonard Nathan Winslow's signature was not on the upper half of it, when I sent it down on December 14th. I was under the impression I had filled it in, but evidently not. I recall now that the office cut the application in half and sent the upper half back to me with the request that *I Leonard* sign the upper half of the application. I saw Leonard after I received this returned upper half for his signature sometime Monday afternoon. I saw him on the street somewhere and I spotted his car, and followed his car until I found him. I just couldn't remember where that was. I told him at that time with respect to having him sign the application that in my rush to get him to the Doctor and back to his work I had neglected to have him sign the application at the time that I made it out. I don't think there was any questions asked on whether or not the answers were the same as the ones written in the day before. I just asked him to sign that and explained I had overlooked having him do it originally, and he signed without question.

Q. Did he read it over or examine it after he signed?

(Testimony of Fred J. Moore.)

Mr. BOLAND: I object to the question as being immaterial and irrelevant.

The COURT: I will allow it.

Mr. BOLAND: Note an exception.

The WITNESS: No, he signed it at my request.

Q. He did not read it the first day in your presence?

A. No.

Q. He left it to you to write down whatever you considered necessary to make the application effective?

A. He did.

Q. I notice on here, Mr. Moore, that there was—on the side of the application it says "Date; Age 23 years." That is in [33] your handwriting?

A. It is.

Q. Will you explain to the jury what you said about requesting the company to date the policy in that way?

A. Insurance premium dates from the nearest birthday, and the fact Leonard was born on the 2nd day of May, 1911, and writing his application on the 14th day of December, he would be over the six months' period, and closer to 24 than 23, and our company rules permit us to date a policy back six months on request of the applicant. It being a lesser premium for him to pay, I told him that—that was a point I brought out to him, by taking it at this time so close to the 23-year period I could date it back to the age of 23, which would save him a few cents per year.

(Testimony of Fred J. Moore.)

Q. What did you state to him would be the effective date of the policy by dating it back in that way as of 23? To what date would you have to go back where his——

A. (Interrupting) That would be left to the home office. I would make out the request to date it at the age of 23 and they would arrange it to come under the six months' period.

Q. It would be some day prior to November 21, 1934?

A. Yes, in order to get him under the six months.

Q. So the policy that was to be issued was to be issued as of some day prior to November 21, 1934, that is correct, is it?

A. That is right.

Q. There is a provision here—paragraph 14—that appears to be blank on that. There is no space filled in on that application. That is true, is it?

A. That's true.

Q. Did you particularly call paragraph 14 to his attention?

A. No, I did not.

Q. When he paid you this $100 in cash, had you had discussion [34] as to the method of payment of premiums, Mr. Moore?

A. Leonard asked what the quarterly rate would be, and I told him it would be $67.20, and we figured that out that it would be higher than an an-

(Testimony of Fred J. Moore.)

nual premium. To start it, he wanted to put it on the quarterly basis. I suggested that he take it annually, that the first year would be the hardest, and after that he could meet, and it is in line with the policy of our company to write as much annual business as possible, which is not only advantageous to the insured, but there is less chance of lapse, and it is less expensive detail to look after.

Q. When he was talking to you about the payment of the policy on a quarterly basis, had you had any discussion prior to that time about making the insurance effective immediately

A. Yes, I told him if the quarterly premium was paid in full, assuming that the medical examination and inspection was satisfactory, his policy would be in force immediately.

The WITNESS: It was his thought that the insurance would go into force immediately.

Mr. NELSON: Q. That is what he led you to believe he wanted?

A. Yes.

Q. Mr. Moore, you gave him a receipt, didn't you, for $100?

A. I did.

Q. Is that the original, so far as you recall?

A. It is.

Mr. NELSON: We will offer this in evidence as plaintiffs' Exhibit 1, and consider it as read.

The COURT: So received. (The document was marked "Plaintiffs' Exhibit 1.")

(Testimony of Fred J. Moore.)

Mr. NELSON: Q. The $100 that was paid under that receipt was more than sufficient to pay the quarterly amount that would have [35] been due to make the policy effective immediately had premiums been designated to be paid in that way, isn't that true?

A. Yes.

After I sent the original upper half of the application blank, there was no further discussion between myself and Leonard with reference to changing the effective date or any other provisions. I later forwarded to the Company a statement of the facts in letter form, with reference to this particular transaction.

Mr. NELSON: We will offer in evidence the application blank with the handwriting that appears on the upper half of the first page, and the latter questions of which will be identified in the deposition that was taken.

Mr. BOLAND: I have no objection to it going in. It is merely a matter of convenience. I think the copy is attached to our answer.

The COURT: Then I think we had better accept the whole document.

Mr. NELSON: Yes.

(The document was marked "Plaintiff's Exhibit 2.")

Q. Did you have authority from your company to tell prospective applicants for insurance that policies could be written through you that could be made effective immediately?

(Testimony of Fred J. Moore.)

A. I always tell them providing the premium is paid that it's subject to——

Q. Subsequent approval by the company?

A. Subsequent approval by the home office. I never know if the company will accept them or not until it gets to the home office.

Mr. BOLAND: Is that authority in writing?

A. How is that?

Mr. BOLAND: I would ask, with the Court's permission, if such authority that you have is in writing?

A. In our printed instructions. There are certain things which come into whether or not the company will accept a prospect. It might be health, medical impairment, environment, or occupation. I have had prem- [36] iums paid me in full I thought were all right, but for some reason the company, through their personal inspection, had me return the money and decline to accept the case. So I never know until a policy is issued whether or not it will be accepted.

Mr. NELSON: Q. You are authorized to tell them, subject to the approval of the company, the policy can be made effective as of the date of the application, or even in this instance dating it back a few weeks?

A. Yes.

Q. You have that authority?

A. Yes.

(Testimony of Fred J. Moore.)

Q. And you have written policies on that basis?

A. Yes.

Q. Taken applications on that basis?

A. Yes, sir.

Q. Did Leonard Winslow, as far as you know, give you any untruthful answers to any questions that you sought to write the answers to?

A. He did not.

Q. So far as Leonard Winslow was concerned, was there anything more that you suggested or stated would have to be done by him to make the policy effective immediately that he refused to do or would not do, upon request by you?

A. Well, he complied with all my requests.

Mr. NELSON: So far as he was concerned, he did everything he knew of that was necessary to make this policy effective as of the date set in the application to give him an age of 23 years?

A. He did.

Q. Did Leonard Winslow have any information from you as to the type of receipts that were issued by agents of this company?

Mr. BOLAND: I object.

The WITNESS: No.

Mr. BOLAND: I move to strike out the answer. I object as being incompetent and immaterial. [37]

The COURT: I will allow it to stand.

Mr. BOLAND: I will note an exception, if the Court please, because it contradicts Section 14 of the application.

(Testimony of Fred J. Moore.)

Mr. NELSON: Q. Did you hand to Lorenzo Winslow for his inspection or reading any documents that might contain rules and regulations of your company with reference to issuance of policies?

A. No.

Q. So then is it true, if I might be permitted to summarize the evidence—you simply had this application blank there, you filled it in, and on the return from San Francisco, had him sign it, without his ever having read the upper part of it, as far as you know?

Mr. BOLAND: I again renew the objection. It is immaterial whether he read it, or not, because, under the law of California, and the Federal Court decisions, he is presumed to have read it. The United States Supreme Court has so said.

Mr. NELSON: We are offering it to show the reasons why he did not read it.

A. Yes.

Mr. BOLAND: I note an exception.

Mr. NELSON: The balance on this premium as indicated on the receipt, was some $153. was it not?

A. And Fifty cents.

Q. How was that to be paid?

A. Within sixty days.

Q. He agreed to do that, did he?

A. He did.

Q. Was the offer of payment made to you afterwards?

(Testimony of Fred J. Moore.)

A. It was. After his death. It was.

Q. You did not accept it?

A. I did not.

Q. Under instructions from your company, is that right?

A. Well, I had no instructions from the company, but I thought the case was out of my hands and I suggested it be sent to our home office direct.

[38]

Mr. NELSON: Q. That offer was made, you recall, do you not, within the 60-day period?

A. I am under the impression it was. I don't remember the exact date, but I assume it was.

The COURT: In other words, to the best of your recollection it was?

The WITNESS: Yes.

Mr. NELSON: On February 11, 1935, I offered you the $153.50 and then in view of your refusal it was deposited with the Bank of Eureka to the credit of the Mutual Life Insurance Company of New York, after the company had written its refusal to accept the money.

Mr. BOLAND: I admit that the offer was made, Mr. Nelson, and I assume that the deposit was made, although we never checked on it.

Cross-Examination.

Mr. BOLAND: Q. You have your instruction book, have you?

A. Yes.

Q. May I glance at it, please?

(Testimony of Fred J. Moore.)

(Witness hands book to Mr. Boland.)

Q. This instruction book, Mr. Moore, was in your possession and under it you acted at the time of the application in question?

A. Yes, sir.

Mr. BOLAND: Q. I think I understood you, Mr. Moore, to say that these conversations you had with Mr. Winslow were all prior to the signing of the application. On what date was it—the time he put his signature to the application?

A. I wrote the application on December 14th, but the part that was returned for his signature was signed by him, I would say, on December 17th. If that would be correct, it would be December 17th. That is correct, because Tuesday was the 18th—the day he was killed.

Q. Did you have any conversation with Winslow between the 14th and the time he put his signature on the application, on the 17th or 18th?

A. I did not. [39]

Q. All the conversation you had with him, then, was the date that you wrote in the figures on the application—that is, December 14th—it was all prior to that time?

A. Yes.

Q. You were instructed to return the $100 back to Mr. and Mrs. Winslow, were you not?

A. Yes.

Q. Did you do so?

A. Yes.

(Testimony of Fred J. Moore.)

Q. Upon what date?

A. I think it was the 26th day of December. I can tell you exact. (Witness refers to papers) December 26, 1934.

Testimony of

ANNIE E. WINSLOW

For Plaintiff.

My name is Annie E. Winslow, and am the plaintiff in this case. I am the surviving widow of Lorenzo N. Winslow, who died July 3, 1935. He and I were the parents of Leonard Nathan Winslow. I recall of making a deposit at the Bank of Eureka to the credit of the Mutual Life Insurance Company of New York, in the sum of $153.50; it is still there to the credit of the Company. Such deposit was made within the sixty day period after Leonard was killed. The $100. was tendered back to me after Leonard's death, but I did not accept it.

[40]

Testimony of

GERALD W. MURRAY

on behalf of plaintiff, by deposition.

My name is Gerald W. Murray; I reside at 266 Dolores Street, San Francisco, and am connected with the defendant, The Mutual Life Insurance Company of New York, in the capacity of Agency Cashier. The territory over which my agency

(Testimony of Gerald W. Murray.)

cashier work extends is Northern California and the State of Nevada.

I know William L. Hathaway, who is the Manager of the San Francisco Agency of The Mutual Life Insurance Company of New York. His agency covers the territory of Northern California and the State of Nevada, which includes the County of Humboldt, State of California.

I have been the San Francisco cashier for five years last past, and Mr. Hathaway has been the district manager for that entire time and longer.

I know Fred J. Moore of Eureka, California, and have known him about fifteen years. During that time he has been connected with or a representative of the defendant Company in the capacity of Agent. His agency covers the territory generally of Mendocino, Humboldt and Del Norte Counties in this State.

I am the agency cashier in the San Francisco Agency over which Mr. Hathaway is manager. I am an employee of the Mutual Life Insurance Company of New York, appointed by the New York office, and am not an employee of Mr. Hathaway's. During the fifteen years that I spoke of Mr. Moore having been the agent of this company, I have also been in the employ of the defendant Company, resident here in San Francisco. During the fifteen years which I have known Mr. Moore he has been acting as agent for the defendant Company in the three counties above mentioned.

(Testimony of Gerald W. Murray.)

I have the company files, or records, with me with reference to the matter of the claim of the plaintiffs arising out of the [41] application of Leonard N. Winslow, upon which this case is based. Leonard Nathan Winslow was a policy holder in the defendant company before December 4, 1934. He had a twenty year endowment policy in the amount of $2,000 which was issued on June 10 of 1926, and was payable to the insured if living at maturity; in case of prior death, to his parents Annie E. and L. N. Winslow, or the survivor of them. That policy was issued through the San Francisco agency and the application was written by Fred J. Moore of Eureka, California, the same person who is now and was on December 4, 1934 our resident agent.

The records of the company show that we received in San Francisco on December 15, 1934, the application, incomplete, for another policy on the life of Leonard Nathan Winslow. It was received from Doctor E. J. Hill, who made the examination at Eureka, California. We did not receive any communication from our agent, Fred J. Moore, at that time. The application was dated in Eureka on December 14th. That is, the doctor's examination was dated December 14th.

We communicated with Fred Moore with reference to the incomplete form of the application on the same day the application was received in the office. On December 15th the upper half of the application was returned to the agent, Fred J. Moore,

(Testimony of Gerald W. Murray.)

with a letter from the office which read as follows: "Kindly note that before the above mentioned application can be forwarded to the Home Office, it will have to be signed by the Insured. When completed kindly return to this office, where it will receive our immediate attention." I don't believe there was any telephone conversation with Moore about the form of the application at that time because of the fact that the letter which was written with it would indicate that the transaction was handled by mail. The upper half was returned to our San Francisco office on [42] December 18, 1934. It was in the same form which had been returned to him, and the only change—the only addition was that the application was then signed by the applicant. I have no notation as to the time it was received on December 18th.

The application was then forwarded to the Home office in New York on the same day. There was a memorandum attached to the application initialed by Fred J. Moore stating "Sorry my carelessness delayed this 'app' going to H. O.". Our office did not send any statement in with that application to the New York office. At the time the application was forwarded to the Home office there is an entry or an office communication that goes along with it that lists the number of the policy and the amount of insurance the applicant may then have in force in our company. Our San Francisco office accepts all of the applications, that is, physically as far as

(Testimony of Gerald W. Murray.)

the application is concerned. They don't act upon them though, nor do they submit any recommendations. We don't make any notation on the face of the application, or attach to it, with reference to the desirability or undesirability of taking the application and executing a policy on it.

Policies are issued at the Home office, but they are relayed from our office after they have been approved in New York. They are not executed in San Francisco. There is no one authorized here (San Francisco) to issue a policy. Mr. Hathaway has no authority to issue a policy; only to pay a policy—that is, to pay a policy claim. Policy claims are paid out of our San Francisco office by checks in a good many cases; but that is all done in each instance by special authority that is granted in that particular case. That is, the claim is approved in New York, and to hasten the payment of the money to whom it may belong, why, the company will wire out and state that such and such a claim has been approved, and that we may issue a draft to [43] the proper people for the amount due.

The San Francisco office forwarded, on December 18th, this application of Leonard Nathan Winslow to our Home office at New York without any further comment than I have already indicated. On December 20th a letter was received from Fred J. Moore of Eureka, the agent in this case, as follows: "Please send proof of death form for above party who was accidentally killed last eve-

(Testimony of Gerald W. Murray.)

ning as per newspaper clipping herewith. Also the above party applied for a $5000.00 20-year endowment Dec. 14, 1934. Applicant paid me $100.00, and had agreed to pay balance of premium within 60 days." That was signed "Fred J. Moore" and the case he was referring to was the Leonard Nathan Winslow case. Later the $100. was forwarded to our company. I have not the date here that the money was received. This date of December 20th was the first intimation that we had had that the $100 had been paid. The $100 was sent to us by Fred J. Moore. There was no statement from Moore as to what form the promise or obligation to pay the balance of the premium was evidenced by. I have only his statement of December 20th, that has been referred to; he said the applicant had paid $100, and had agreed to pay the balance within sixty days. The premium that would have been due on this particular policy and application if issued, would be $253.50 on the basis of the annual payment of premiums. On the same application and policy the amount of quarterly premium due if the policy had been issued on that basis, would be 26½ per cent of the annual premium. By taking an annual premium rather than a quarterly premium, basis of payment, the policy holder would save at least six per cent per year. The quarterly premium payment that would have become due had the policy been issued on that basis would have been $67.18.

In response to your question as to whether the

(Testimony of Gerald W. Murray.)

company authorizes its agents, such as Mr. Moore, to accept promissory [44] notes as part payment of premium, I will state that that is covered in the Instructions to the agent: In the Rate Book there is listed "Rules, Regulations and Instructions for Agents," and under the heading "Premiums Paid with Applications" the following instructions are given. Shall I read that instruction?

Q. Well, you may read that, and I will ask you some further questions about it.

A. "The Company will not recognize initial premiums paid in advance of delivery of policies unless the full premium is paid in cash, a conditional receipt is issued, and the full premium is forwarded to the agency. When the full cash premium is paid at the time application is made, the amount must be entered in the portion of the application beginning '$.....' " that is the dollar sign, " 'in cash has been paid to the Soliciting Agent,' and the number of the conditional receipt noted in the proper space. Agents may accept initial premiums between the time application is made and policy is delivered provided that a conditional receipt is duly issued and further provided that the applicant has continued in good health and all other conditions, including applicant's occupation, have remained unchanged. The full amount of the premium and a statement covering details of payment should be sent immediately to the agency. Any

(Testimony of Gerald W. Murray.)

representative who fails to comply with this rule will be liable to immediate dismissal."

Q. Notwithstanding that written instruction, is it not a fact that your agents have, with the knowledge of the company, accepted promissory notes as payment in whole or in part of premiums under policies?

A. No.

Q. Or is that limited to your own particular knowledge and experience?

A. There is a difference there on a note; if the policy is issued the agent is permitted to deliver on a note settlement—if a policy has been issued and has been placed in the agent's hands [45] for delivery.

Q. Then you mean he can take part cash and part note?

A. He can deliver the policy then on that basis, yes.

Q. And that is considered payment of that first premium?

A. Yes, it is.

Q. Is it not customary for life insurance companies generally in Northern California to allow their agents to accept promissory notes made out in favor of the agent personally, as part or full payment, as the case may be, of premiums due on the policy applied for, and the company holds the agent personally responsible for the amount thereof?

(Testimony of Gerald W. Murray.)

A. As stated in the first instruction there is only one way that the company protects an applicant from the time the policy is written, that is provided that he pay in full the premium and a conditional receipt is issued at that time. That is the only transaction that the company recognizes as putting the policy effective as of that date—provided that he passes the other requirements.

Q. Speaking now, Mr. Murray, about the general practice of life insurance companies in this area, as far as you know, irrespective of written instructions contained in manuals or otherwise, of issuing policies when they know that their agent has first accepted the personal obligation of the applicant, and that they, the insurance company, charge back against and hold the agent personally responsible for the premium due. Don't you know that to be the practice of life insurance companies?

A. No. The question is—it is true with our company, after a policy has been issued and placed in the agent's hands for delivery, but prior to that time, no, they don't permit anything to put that policy in force except the payment of the full premium in cash and a conditional receipt to be issued at that time. After the application has been acted upon and the policy comes out and [46] is placed in the agent's hands for delivery, he may then deliver that policy to an applicant and take a note for the entire premium if he wishes to. In that case the company requires that the note be registered in

(Testimony of Gerald W. Murray.)
their office and if the policy holder does not pay the note, let us say, why, we look to the agent for the net premium on that contract; that is charged up to him.

Q. Are those notes made out to the agent or the company?

A. Those notes are always made out to the agent as an individual.

Q. That is, you allow the agent to deduct what commission would be due him for writing the policy, that is for securing the application, and you charge him for the balance?

A. Yes.

Q. In this particular instance was the agent's commission more or less than $100?

A. In this particular case the agent's commission on the annual premium would have been more than $100.

Q. Have you any objection to stating what percentage he would get of the first premium due?

A. I have not his contract here. On a 20 year endowment it would be 45 percent first year commission on that.

Q. And if issued on a quarterly basis, what would be the agent's premium?

A. The same.

Q. Have you figured on an annual basis?

A. Figured annually and quarterly.

Q. I mean, he would get 45 percent of the annual amount paid?

(Testimony of Gerald W. Murray.)

A. If the policy was payable quarterly he would get 45 percent of each quarter.

Q. For the first year?

A. For the first year, yes.

Q. Now with respect to this particular policy or application, was there a double indemnity feature in case of accidental death?

A. Yes, sir.

Mr. NELSON: Q. Now, Mr. Murray, your company does authorize its agents, such as Mr. Moore, to inform the applicant that [47] he has authority, at least under some conditions, to make a policy effective immediately?

The WITNESS: A. Yes—well, he has the authority to tell the applicant that the policy can be made effective immediately, providing that the full premium is paid and a conditional receipt is issued; and then it is effective in accordance with the agreement that the applicant signs and the conditional receipt that is issued. That conditional receipt is signed by the agent who collects the full premium, and it is also signed by the applicant.

Q. Do you know that your agents do tell prospective insured's as a part of their statement to the insured that "this policy can be made effective immediately?"

A. Yes, they can tell them that.

Q. And there are instances where the insured himself has desired that particular form of policy?

A. Yes, sir.

(Testimony of Gerald W. Murray.)

Q. Is that not true?

A. Yes, sir.

Q. So that you then leave it to your agent to accept the premium and issue the receipt?

A. Yes, sir.

Q. In this particular instance sufficient premium has been paid, if computed on a quarterly basis, to have made the policy effective immediately, had it not?

A. Yes, if the application were written to call for premiums on quarterly basis and a conditional receipt was issued, the $100 would have been more than enough to have paid the quarterly premium.

Mr. Moore, as our resident agent, had a right to the receipts. As to whether he may have had any—he may have lost them. There is no way for me to state if he had a receipt book. I know that Mr. Moore has been furnished with such a book in the past; I don't know whether he had one on that particular day.

We have never received any applications to which any memorandum might be attached, requesting the policy be made effective [48] immediately. The only thing that would indicate that would be where the application shows the binding receipt number and the check comes in for the gross premium, and then that would be a case such as you describe, where the applicant wanted the insurance to become effective immediately. The receipt is issued to the insured and our office does not see it.

(Testimony of Gerald W. Murray.)

We act upon the face of the application with respect to the information that is set forth in Paragraph fourteen. We have received applications wherein request was made by the applicant to have the policy effective immediately through Mr. Moore's agency, as indicated by binding receipt having been issued; that would be the only way we would know. We have no evidence of the issuance of the receipt other than what might be stated in Paragraph 14 only that the check comes in with the application in such cases.

We have the check for the premium, and we have the statement in answer to question fourteen, that so much was collected and the binding receipt, certain number and certain date, was issued. I don't mean a check after allowing the agent's commission; in a binding receipt case it is necessary for the gross premium to be sent in with the application. Then if the applicant is declined a check for the full amount is drawn to the order of the applicant and returned. In the event it is accepted, the agent's commission is then paid by check from the office to the agent. We don't require any report from the agent himself as to whether or not he has issued what I refer to as a "conditional receipt". We rely upon the application alone.

In the case where the applicant has paid either by note or by cash, the premium due, we allow the agent sixty days from the date of the examination to remit to the company. He is then supposed to

(Testimony of Gerald W. Murray.)
have made a settlement with the company. The company [49] allows him sixty in which to remit the premium to the office in the event he has not collected it sooner. At the time he collects, the company requires an agent to forward that money to the company immediately. That sixty day rule would apply in a case where a man has gotten a policy free for delivery and he has delivered it to the insured on a note settlement and has reported the note settlement to the company, and then at the end of sixty days the agent has still been unable to collect the premium from the insured; in that case the company then demands that the agent himself advance the money to pay that net premium on the sixtieth day. But, if he should collect on the note prior to the expiration of the sixty days, the company expects him to remit that to the company immediately. But we leave that to the agent. We make no independent investigation against the agent to determine whether or not he has been paid; those are his rules and that is what he is required to do. If the check is missed, we first check against him when the sixty day period has run.

After forwarding the application to our home office in New York, we received word from Mr. Moore on the 20th of December advising of the death of the applicant, and enclosing a clipping showing he had been killed in some automobile collision. Upon receipt of that information, we wired the Home Office that Leonard N. Winslow had been reported killed

(Testimony of Gerald W. Murray.)

in an accident. The wire was sent on December 20th. The application was received in New York on December 20th P. M. It was sent air mail to the New York office. The figures "2529" on the reverse side of the original application is our agency number of that application.

Q. On the face of the application, in the upper right-hand corner, there is a space printed "For H. O. use," and then apparently filled in by some sort of machine "December 6614." What does that indicate?

A. The "H. O." refers to the home office [50] use, and I don't know what that number represents. That is the Home Office filing number.

Q. Stamped on by your New York office?

A. Yes, sir.

Q. On the back of it appears "Date of issue Dec. 21, 1934." What does that mean?

A. You say "Date" of what?

Q. "Issue, December 21, 1934." Is that a Home Office record?

A. That is a Home Office record, yes, sir.

Q. Does that refer to the issuance of the policy?

A. I don't know.

Q. What would that indicate to you as the Pacific Coast Cashier?

A. It does not indicate anything to me.

Q. Is it not your rule, they put on the date of the issuance of the policy on the application, or any similar application that might be received?

(Testimony of Gerald W. Murray.)

A. I am not familiar with the detail. That is, the application states "Date of issue" in one column under the heading of "Number" and above that there are two dates, one date of November 20, 1934, the other December 21, 1934.

Q. Is it your testimony you don't know what that means?

A. I don't know whether that means whether the policy was issued on that date or not.

Mr. NELSON: Q. This application also has endorsed on it, in the line above the date of issue December 21, 1934, the date November 20, 1934, amount $5,000. You noticed that on there, Mr. Murray?

The WITNESS: A. Yes, I did.

Q. Is it not true that by taking that date as the date of the application by the insured, that it would become the basis of a premium payment computation for the insured as of an age of twenty-three years instead of twenty-four years had he computed the time as of the date of the physical examination by Doctor Hill?

A. Yes, I see on the front side of the application a [51] memorandum stating "Date policy age 23 years," and in that case the company would date the policy back to the last date that he could still pay the rate as of age twenty-three, and in this case that date would have been November 20, 1934.

Q. So you accepted Mr. Moore's request there to date the policy back to allow him to compute the

(Testimony of Gerald W. Murray.)

premiums based on the age of twenty-three, as when under your ordinary rules he should have paid on basis of twenty-four; that is true, is it not?

A. That is true. The Home Office record would indicate that they have taken note of the request on that.

Q. Now on the back of this application you also have a notation "Premium" three series of figures, "244.45, 4.05 and 5" with a total of 253.50. That was the same amount that you had previously computed as the premium due?

A. Yes.

Q. On a basis of a twenty-three year age?

A. Yes, sir.

Q. It says "How paid". I find certain letters there, and figures. Would you read them?

A. Yes. Under the column "Premium" it has the figure of 244.45. Immediately below that there is an item of 4.05, and off to one side a memorandum on a stamp, stating "January '32 Waiver of premium, 20 years." And then in the first column again appears the item of $5, showing double indemnity for twenty years. There is a total then of the first column showing $253.50, and off to the right is a symbol "A" in the column of "How paid" which indicates an annual premium.

Q. How do you explain that first item "January '32?"

A. January '32, waiver of premium—"W. P." is the initial for Waiver of Premium benefit.

(Testimony of Gerald W. Murray.)

Q. Twenty years?

A. Yes, sir.

Q. Why was that dated January '32?

A. That simply refers to the type of waiver of premium benefit. There was a change made in '32 which still was in effect at the time this application was made. [52]

Q. This refers, does it not, to the action that the company's Home Office was going to take on this particular application?

A. Yes.

Q. Not to any other application or policy?

A. No.

Q. Now you see there is an initial "A"?

A. Yes.

Q. That is in lead pencil?

A. No, I am referring to the printed.

Q. I see, "How paid" annual premium. What does the penciled "A" indicate?

A. I would say those are simply the initials of the clerks whose hands the application has passed through, and the same with the other one.

Q. It is a particular method, that is, the use of pencil as distinguished from pen or color?

A. I don't think it makes——

Q. Indicating any department, or do you know?

A. I don't know; no.

Q. Next is a red "B"—is that right, Mr. Boland, "B"?

A. Yes.

(Testimony of Gerald W. Murray.)

Q. What does that indicate?

A. Just another clerk's initials on that application, whose hands it has passed through.

Q. Down in the left-hand corner there are some words and spaces and letters that have been added, apparently. You see the word "Backer?"

A. Yes, sir.

Q. And in black ink "M. E." or "M. R."

A. "M. E." I would say.

Q. What does that indicate?

A. That would indicate the initials of the clerk who attended to the back part of the application, I would say.

Q. To what part?

A. To the back. It says "Backer"; I don't know what its meanings are.

Q. He would look at the whole application, wouldn't he, not just the back?

A. It passes through a good many hands.

Q. You don't know which. The first check, this black pencilled "A"—do you know what that means?

A. No.

Q. The second check is red pencil "B"; do you know what that [53] means?

A. No.

Q. Over to the right "For Medical Dept.", third colmun, "With W. P. and D. I"?

A. Yes.

(Testimony of Gerald W. Murray.)

Q. Do you see those letters?

A. Yes, sir.

Q. And then just read what you see after that written on the original in green ink?

A. The photograph is rather hard to read. Well, it is someone's name with the date of December 20, 1934 written after it.

Q. 20 or 30?

A. It looks like 20 to me.

Q. There is a pin hole right through there. Does your photographic copy show?

A. It seems to be clearer on this. Here is another picture of it; that seems to be fairly clear on that one.

Q. Apparently that was approved by the Medical Department of your Home Office as of that date?

A. Yes, sir.

The face of the application was referred to in the deposition as plaintiffs' Exhibit No. 1, and the back of the application as plaintiff's Exhibit No. 2 attached to the deposition.

Cross-Examination.

The San Francisco Agency office has no authority to accept applications other than to forward them as received to the Home Office for action there; it has no authority to accept and issue a policy upon any application.

Testimony of

FRED J. MOORE

for defendant.

Mr. BOLAND: Q. This morning, or today, we read a rule, No. 77. Just so we get them in chronological order, will you read it again? Will you please read Rule 77?

A. (Reading) "PREMIUMS PAID WITH APPLICATIONS.

"The company will not recognize initial premiums paid in advance of delivery of policies unless the full premium is paid in cash, a conditional receipt is issued, and the full premium is forwarded to the Agency. When the full cash premium is paid at [54] the time application is made, the amount must be entered in the portion of the application beginning 'Dollars ....., in cash has been paid to the Soliciting Agent,' and the number of the conditional receipt noted in the proper space. Agents may accept initial premiums between the time application is made and the policy is delivered, provided that a conditional receipt is duly issued and further provided that the applicant has continued in good health and all other conditions, including applicant's application, having remained unchanged. The full amount of the premium and a statement covering details of payment should be sent immediately to the Agency. Any representative who fails to comply with this rule will be liable to immediate dismissal. See paragraph 78, 157/158."

(Testimony of Fred J. Moore.)

Q. Now, referring to plaintiffs' Exhibit 2, being the application identified this morning, I call your attention to the 14th provision. Will you read that to the jury, please?

A. (Reading) "Dollars ..... in cash has been paid to the Soliciting Agent, and a conditional receipt No. ....., dated ....., signed by the Secretary of the Company and countersigned by the Agent, has been issued, making the insurance in force from such date, provided this application shall be approved."

Q. You did not receive the full first premium, did you?

A. No, I did not.

Q. You did not fill in this clause 14?

A. No, for that reason.

Q. No?

A. Excuse me.

Q. You did not issue a conditional receipt?

A. Not in the form of conditional receipts as provided.

Q. The only receipt you issued is plaintiffs' Exhibit 1, shown here this morning?

A. Yes.

Q. That is the only receipt you issued?

A. That is all. [55]

Mr. BOLAND: Q. Read Section 14 again.

A. Section 14 says—a sign for blank dollars—"In cash has been paid to the soliciting agent and a conditional receipt No. ....., dated ....., signed

(Testimony of Fred J. Moore.)

by the Secretary of the Company and countersigned by the Agent, has been issued, making the insurance in force from such date, provided this application shall be approved."

Mr. BOLAND: Q. The conditional receipts therein referred to contain a signature by the Secretary of the Company, do they not?

A. Yes.

Q. You did not issue one signed by the Secretary?

A. I did not.

Q. Let me ask you to read 78.

A. (Reading) "Section 78"——

Mr. NELSON: Just a moment. Are those the instructions of the company to the Agent?

Mr. BOLAND: Yes.

Mr. NELSON: Of this instruction book that you are reading? There is no claim, is there, that the insured read or knew of the contents or existence of the provisions contained in that instruction book?

Mr. BOLAND: I am not making any claim as to what the applicant knew.

Mr. NELSON: Well, unless it is connected up I say it is incompetent, irrelevant, and immaterial, and object to it on that ground.

Mr. BOLAND: The authority of the agent here is in direct issue, if your Honor please. The plaintiff has alleged he was duly authorized to do a certain act. The authority of the agent is predicated upon that allegation in the complaint. [56]

(Testimony of Fred J. Moore.)

The COURT: There are two issues there. First of all, if the agent had the authority, and, second, the question as to whether he had what is sometimes looked on as being the equivalent of authority.

Mr. NELSON: If your Honor will recall, Mr. Murray testified in the deposition they knew and the agent was accustomed to and did tell the applicant they could make that insurance effective immediately, and that they left to the agent—they left it to the agent to give whatever form of receipt was necessary to the applicant, and as Mr. Moore has testified, the applicant had done everything that he thought could be done and was necessary to be done in order to make that policy go into effect immediately, subject only to the final proof of the company, which we have shown on the application, itself.

Mr. BOLAND: In the form application, itself, Mr. Nelson, just referred to, it says: "It is agreed that no agent or other person except the president, a vice-president or a secretary of the Company has power on behalf of the company to bind the company by making any promises, respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance", right in the application, itself, the applicant is especially notified he is not insured unless and until a policy of insurance is delivered to him.

The COURT: Q. You informed Mr. Winslow, did you, that he was insured?

(Testimony of Fred J. Moore.)

The WITNESS: I never informed anyone, your Honor, that they're insured. It is subject to the home office ruling. I seek only applicants I think are insurable, but sometimes my judgment is not—— [57]

The COURT: (Interrupting) Q. Did you tell him his insurance would run from any particular date?

A. I told him by paying the full premium, assuming that his medical examination was acceptable to the home office, his insurance would be in force immediately.

Q. That is, when you say "immediately" from the date he signed?

A. From the date of medical examination.

Q. In other words, if he paid the full premium at any time up to——

A. (Interrupting) Subject to his continuing to pay annual premiums there are certain rules in there if a person pays so many years it has continuing features, even if the policy should not be kept up.

The COURT: Q. You are getting away from my question. You gave him this receipt, and within what time did he have to pay the balance of $100?

A. In sixty days.

Q. $100 carried him for a quarter?

A. More than that.

(Testimony of Fred J. Moore.)

Q. And had they acted favorably before he died he would have been insured according to your theory, is that your idea?

A. That is my idea.

Q. He would have been insured from the date he had the medical examination had the home office issued the policy? According to my request the policy would be dated previous to the medical examination—would be dated November 20th.

Q. If it had been paid it would be in effect?

A. Yes.

Q. Then you so represented to him, didn't you?

A. Yes, I did.

Q. Have you ever followed this practice before?

A. Yes.

Q. And issued this kind of receipt?

A. Yes.

Q. How frequently did you do this as against the other kind of a receipt?

A. I do that practically in all cases. I haven't [58] had a conditional receipt book for quite some time, and the office has accepted my receipts on that order, and noted in the blank 14 the cash had been paid, that then assuming the medical examination is satisfactory would date the policy on the date of medical examination.

Q. In other words, your company has followed this type of receipt?

A. Yes.

Q. For how long a time?

(Testimony of Fred J. Moore.)

A. I have been with them actually since February, Twenty.

Q. And even though the instruction was different, in view of the fact that they have put in your hands that other type of receipt book you have gone ahead with this in attending to your business?

A. In many cases.

Q. In every case that involves a date prior to the actual issue of the policy, that a policy be dated back to that date, is that correct?

A. No.

Mr. BOLAND: That has nothing to do with this matter—the dating back.

The WITNESS: That has nothing to do with it. To make that clear, if I were writing you for insurance today and you paid me a certain sum of money, it is my belief that that receipt would cover. I am protecting my client by saying that I have accepted from him so much money, and the company receives that report in due time that I have.

The COURT: Q. You look upon it as a temporary coverage prior to action on the policy itself?

A. Subject to the company rules, yes. The fact a man pays me the full amount is no guarantee on my part I could assure him he would get a policy. That money could be returned for reasons I do not know anything about, and [59] the company would request I notify Mr. So-and-so the company declines the risk. I am not notified of the reasons.

(Testimony of Fred J. Moore.)

Q. Supposing I should give you the full amount and you should give me a receipt, and supposing I should die before the company gets your papers, you wouldn't cover me? Is that your theory?

A. I would say that if the company rules along medical lines and what they call "personal inspection" had been favorable you would have been covered.

Q. In other words, they are not in a position to deny it unless they can point out something wrong in the medical history?

A. Not only medical, but environment when the boy or person is living.

Q. Supposing you should give a misstatement in an application?

A. I wrote a young boy in a certain place. He lived with his parents. The father was reputed to be a bootlegger, before liquor was legal. The boy paid me the full premium. The medical examination was satisfactory, but our company notified me to advise this young man they declined to take the risk, without giving me any reason, and to return the money. I felt an injustice had been done, and went to the auditor of the particular company where he worked and the cashier in the bank, and asked them to write to—I wrote a letter myself. From a source I found out why the company declined him, due to his living at home where his father was a bootlegger, and they wouldn't take the risk. That would be a moral risk, or environ-

(Testimony of Fred J. Moore.)

ment. There is nothing against the boy from a medical character standpoint, but they did not want to accept a risk they thought might result in a claim due to that.

Q. Your thought is if it was the right kind of risk and the right kind of medical examination——

A. Yes. [60]

Q. You believe the company then would honor it as being in force during this period prior to the issuance of the policy?

A. I do.

Q. You do now, do you?

A. Yes.

Q. In other words, that is your understanding of the attitude and the policy of your company, as you have conducted yourself here for some years?

A. Yes.

The COURT: No further questions on the part of the Court.

Mr. BOLAND: Q. Is that true where the full premium is not paid in advance?

A. What is that?

Q. Is your statement just made to the Court your opinion what would be the custom true—does it hold true where the full premium is not paid to you in advance in cash?

A. It is subject to the full premium.

Q. It is subject to the full premium? I was going to call your attention to what you just read, "Any representative who fails to comply with this rule will be liable to immediate dismissal."

(Testimony of Fred J. Moore.)

A. I understand the rule.

The COURT: Q. How soon do they have to pay the balance?

Mr. BOLAND: Immediately.

(Mr. Boland handing book to witness).

The COURT: I am asking the witness.

Q. I want to know what he does, not what he reads out of the book.

The WITNESS: If a person paid me a certain sum and agreed to pay me the balance in 60 days my company would honor that.

The COURT: Q. They would?

A. Yes.

The COURT: That is all. No further questions on the part of the Court.

Mr. BOLAND: Nothing further. [61]

Mr. NELSON: That is all.

Mr. BOLAND: Defendant rests.

Mr. NELSON: The plaintiff rests.

The COURT: How much time do you want to present your case?

Mr. BOLAND: I would like to make a motion for a directed verdict.

The COURT: Proceed.

Mr. BOLAND: At this time, if the Court please, I move the Court to direct the jury to return a verdict for the defendant. It is your Honor's custom to present this in the presence of the jury?

The COURT: I always take the motion. If you wish to argue it the argument is not before the

(Testimony of Fred J. Moore.)

jury, but the making of the motion and the ruling on the motion is in the presence of the jury.

Mr. BOLAND: On the following grounds:

1. There is no evidence to sustain a finding or verdict that any contract of insurance or otherwise was entered into, as alleged in either the first or second count of the complaint.

2. Fred J. Moore had no power or authority to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

3. Fred J. Moore did not purport or attempt to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

4. The written application signed by Leonard N. Winslow was a written offer to enter into a contract of insurance according to its terms, which offer was never accepted according to its terms.

5. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be [62] effected until a policy was issued and delivered to Leonard N. Winslow during his continuance in good health, and no such policy was ever delivered.

6. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be effected unless the first premium thereon was paid in full during the good health

(Testimony of Fred J. Moore.)

of Leonard N. Winslow, and said first premium was not so paid in full.

7. There was no ratification of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

8. There was no estoppel of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

9. The delivery of a policy and the payment of the first premium conforming to the written application, was essential to any contract between said Leonard N. Winslow and defendant.

10. The death of said Leonard N. Winslow prior to the consummation of a contract by delivery of the policy and payment of the full premium, destroyed the subject matter of the negotiations for a contract.

The COURT: Before passing on that, I am willing to open up the case for this purpose, if you wish. Having placed in the record everything pertaining to what you consider the authority as far as any written instructions or otherwise given——

[63]

(Testimony of Fred J. Moore.)

Mr. BOLAND: Your Honor ruled against me?

The COURT: I am opening the case for you to place that in the form of the cross-examination of a witness. I will treat the examination of the court as being a direct examination, and you can confront him with the statement he has made, or any instructions you wish to ask him about—such questions as are proper. The witness will return to the stand and then I will pass upon the motion, treating it as a cross-examination of the witness, my questions being asked as part of the direct on the part of the plaintiff.

FRED J. MOORE,

recalled for

Cross-Examination.

Mr. BOLAND: Q. I call your attention Mr. Moore, to the portion of the rules which you have already read—77, I believe—"The Company will not recognize initial premiums paid in advance of delivery of policies unless the full premium is paid in cash, a conditional receipt is issued and the full premium is forwarded to the Agency," and the statement that in the event it is disregarded you are liable to immediate dismissal. In view of that rule, and what I have read, do you now state that the company would consider a policy in force if only a portion of the premium were paid and conditional receipt issued?

(Testimony of Fred J. Moore.)

A. Subject to a note for the balance, it is my understanding the company would.

The COURT: In sixty days?

The WITNESS: Yes.

Mr. BOLAND: Q. Both you and the company would disregard this rule?

A. I don't know how often the company changes the rules, but there has been something in regard to notes within the last few years since I have had a contract, and it is my understanding [64] that a note would make it binding. I get that from the San Francisco office.

Q. Where have you that? In writing?

A. No, I have not. Well, I will take that back. I have something in writing on that, too, in circular form. A printed form.

Q. Something that alters where I have read to you?

A. In regard to notes. Now, there is nothing published in my red book concerning notes.

Q. Are you sure of that?

A. Well, if there is I don't know where it is.

The COURT: Q. But you have testified further that you have assurance that you will get that money inside of sixty days, as I understand.

A. Yes.

Q. That goes beyond notes. That goes to where you think is proper credit?

A. Yes.

(Testimony of Fred J. Moore.)

The COURT: We don't want this case to get off on an error or mistake here.

Mr. BOLAND: Q. Now, will you read No. 78?

A. (Reading) "When Insurance Is Effective."

Mr. NELSON: The entire rule——

The COURT: He is confronting him with what I understand are the rules of the company now.

The WITNESS: (Reading) "When Insurance Is Effective."

"The attention of Agents is particularly called to the clause in the application by which the applicant agrees that the insurance 'shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who herein agrees to pay the premium, during the insured's continued good health, and unless and until the first premium shall have [65] been paid during the insured's continuance in good health.' This applies to all cases except where the full premiums are paid in cash and conditional receipt issued and such premiums immediately forwarded to the Agency, and suggests an argument for urging payment of premiums with the application."

Mr. BOLAND: Q. In view of that, will you still say that your conclusion is that the—or that you had instructions that the insurance can go in force without the full payment of the premium—forwarding it to the Home Office, or Agency Office and issuing conditional receipt?

(Testimony of Fred J. Moore.)

A. I repeat my understanding is that part of cash followed with the difference in a note is acceptable to put a policy in force.

Q. Immediately and before delivery of the policy?

A. Subject to a person being accepted due to medical and inspection as the company thinks——

The COURT: Q. You say a note or credit of sixty days which you consider cash, is that correct?

A. That is correct. That is my understanding.

Q. I wish you would add that. That element has been left out. If that is your understanding we want to know.

Mr. BOLAND: Q. Is that credit equivalent to a note, or must you have a note?

A. A note——

Q. Without a note it is not good?

A. Cash or a note.

Q. Either cash or a note?

A. Yes.

Q. Didn't you get a note here?

A. No.

The COURT: Q. Didn't you say in several cases you did business where you did accept cash payable in sixty days?

Mr. BOLAND: I think your Honor was confused.

The COURT: He is testifying now. [66]

The WITNESS: I am a little confused at your question, there, your Honor.

(Testimony of Fred J. Moore.)

The COURT: Q. As I understand it, you said if there was a balance due on a premium it was paid within sixty days—that was satisfactory. Is that correct?

A. Subject to a note.

Q. But you had to have a note?

A. Yes.

Q. Your attitude in this case is you feel, not having been provided with a note, you were not obligated?

A. You are asking me a direct question. My personal opinion is the claim should be paid. If there is any irregularity in this case it does not belong on the deceased boy.

Q. In view of the statement, have you ever done this before in which you have accepted extended credit for sixty days?

A. I have taken the notes or paid the premiums myself.

Q. Have you ever done it before where you didn't take a note, but did give credit?

A. Yes, by paying the premiums, myself. I explained in testimony this morning how I wrote this application.

Q. Let me ask you then: How was it you did not pay it in this case, yourself?

A. Our closing date is the 25th day of the month. The application was written on the 14th, and it was my intention to have done that very thing—pay it on the 25th. That is what I would have done.

(Testimony of Fred J. Moore.)

Q. You were going to pay the balance of that premium to the company within the sixty days, you, yourself, personally—is that correct?

A. Yes.

Q. And, therefore, you were relying upon him to reimburse you for that difference?

A. Yes, sir.

Q. And consequently you felt the premium was paid, is that correct?

A. No, I would not say it was paid, because it [67] wouldn't be paid to the company.

Q. It came under your regular, ordinary business relationship, is that correct? In other words, that was in the course of business?

A. Yes.

Mr. BOLAND: Q. Mr. Moore, I can see where the confusion has arisen. You have extended a 60 day credit, yourself, or you are allowed a 60 day credit for paying the Agency office where the premium is not paid in full in advance, but you have the policy for——

A. Yes.

Q. You have a 60 day credit?

A. Yes.

Q. But you are supposed in that event to take a note and register it at the Agency Office?

A. Yes.

Where it is intended for the policy to go into effect the day that the applicant takes the medical examination, you either have to send the full pre-

(Testimony of Fred J. Moore.)

mium in cash to the Agency Office or part cash and a note for the balance. That was your testimony, was it not?

A. Yes.

Q. And that is correct?

A. Yes.

Q. So that in order to make the policy go into effect the day that the applicant takes the medical examination, the full premium must reach the Agency Office in San Francisco either in cash or cash and a note, that is correct?

A. Yes.

Q. You did not receive a note in this case?

A. No.

Q. And you sent only the $100—Was all that was ever sent?

A. Yes.

Mr. BOLAND: That is all.

Redirect Examination.

Mr. NELSON: Q. Did you have an arrangement or custom with the company whereby you say you intended, yourself, not later than the [68] 25th of each month, to advance whatever difference was necessary to make this particular policy effective?

A. Yes.

Q. And you had intended to forward the difference there—whatever would be necessary, between the amount due on the premium and the amount

(Testimony of Fred J. Moore.)

paid to the company, so as to make this policy effective immediately?

A. Yes.

Q. I understand you to say in answer to his Honor's question that the practice had been followed or approved by the company in other cases?

A. Yes.

Q. Isn't it also true in this particular instance that the insured, that is, Lorenzo Winslow, offered to pay the amount that would be necessary to make the policy effective immediately on the quarterly basis, and that would have amounted to some $67?

A. Yes.

Q. And that you told him he could make a saving by paying it on an annual basis, of about 6 per cent.?

A. Yes.

Testimony of

MR. MURRAY

by deposition.

Mr. BOLAND: I now would like to read the balance of the deposition of Mr. Murray, which deals with this matter.

The COURT: You may proceed, then.

Mr. NELSON: Subject to an objection on our part as incompetent, irrelevant, and immaterial.

Mr. BOLAND: We have already read the portion of the deposition dealing with 78.

The COURT: Proceed.

(Mr. Boland reading from page 32, line 22, of deposition as follows):

(Deposition of Mr. Murray.)

"130. Not to be delivered. A policy must not be delivered, nor the initial premium accepted, unless the applicant is in good [69] health and his occupation as stated in application remains unchanged. This rule applies regardless of the fact that the premium may have been previously collected. In any case of change in the applicant's health or occupation, the policy must be returned at once to the manager with a statement of facts, that he may ascertain from the company whether the policy should or should not be delivered, and if to be delivered, upon what conditions."

(Continuing reading to page 34, line 4 as follows):

"Now, we have here, Mr. Murray, a book of conditional receipts, and I will tear one out and show it to you. That is the form which is referred to in the rules which have just been read?

A. Yes, sir."

Mr. BOLAND: If the Court please, we offered that in the original deposition, but I understand that is not here.

The COURT: I can't supply anything.

Mr. BOLAND: I understand.

Q. Are you sure, Mr. Moore, that you have none of those receipts with you?

A. No.

Q. Or available here?

A. No, I have not.

(Continuing reading of deposition, starting with line 5, page 34):

(Deposition of Mr. Murray.)

"Q. And that is the form which you referred to in your testimony concerning what Mr. Moore could or should have done if the full premium had been paid in advance?

A. Yes, sir."

(Continuing reading to page 36, line 9):

"Q. Now, I show you, Mr. Murray, a book entitled 'Rules, Regulations and Instructions for Agency Managers and Cashiers.' What is that book?" [70]

Mr. NELSON: We object to that on the ground it is incompetent, irrelevant, and immaterial. There is no question here about any agency manager or cashier, and what the company's instructions may have been to Mr. Murray and the San Francisco office, unless it can be shown that the applicant Winslow was referred to by Mr. Murray in this transaction it necessarily would be hearsay and incompetent, irrelevant, and immaterial. I don't think it is claimed Winslow ever saw Murray *ever saw Murray* or ever knew of his existence, or ever knew any agency manager or cashier in San Francisco. Therefore, the instructions of the company to that cashier certainly can be of no help in the determination of the issues of this case.

Mr. BOLAND: They are all rules and regulations, if your Honor please, designed to protect this company, operating as it does in 48 States, having over two million policies outstanding. They do their best to put in rules and regulations so that no agent

(Deposition of Mr. Murray.)

can do the things some of them try to do, and naturally it is perfectly proper to put before the Court and Jury.

The COURT: Read the question, Mr. Reporter. (Question read.)

The COURT: Is that the book brought to the attention of Mr. Moore later?

Mr. BOLAND: It follows right back as to what Murray can do with respect to money Moore sends to him. If Mr. Moore does not do a certain thing in accordance with these rules Murray would have shot it right back to him.

The COURT: I will allow it.

Mr. NELSON: We note our exception to the ruling of the Court.

(Continuing reading of deposition on page 36, line 9, as follows): [71]

"A. That is the book, as indicated from its title, which is given to the cashiers and the manager to guide them in conducting the company's business."

Mr. BOLAND: That is exactly what it is.

Mr. BOLAND: (Reading) "Initial premiums are payable in cash."

Mr. BOLAND: Page 36, line 12 (Reading) "This book that you refer to is the one which is produced here?

A. Yes, sir.

"Q. That is one which contains instructions for your guidance and your authority?

A. Yes, sir."

(Deposition of Mr. Murray.)

"Mr. BOLAND: Senator, I will read from Section 5, headed 'Premiums,' Rule No. 8", and reading to page 37, line 19, as follows:

"Q. This book you refer to contains all of your authority, does it not, Mr. Murray?

A. Yes, sir."

(Mr. Boland continuing reading of deposition, page 37, line 24, as follows):

"Q. I understood you to say, in answer to one of Senator Nelson's questions, that the San Francisco Agency Office has no authority to accept applications other than to forward them as received to the home office for action there, is that right?

"A. Yes.

"Q. It has no authority to accept and issue a policy upon any application?

A. No."

Defendant rests.

Thereupon the defendant renewed the Motion for a Directed Verdict in favor of said defendant.

Thereupon attorney for plaintiff moved the Court to instruct the Jury to return a verdict in favor of the plaintiff in the sum of $10,000.00, with interest from date of death of Leonard [72] Winslow, that is, from December 20, 1934, with seven per cent interest.

Thereupon the Court granted the Motion for a Directed Verdict in favor of the defendant and gave an exception to counsel for plaintiff.

The Court thereupon instructed the Jury to retire, elect a Foreman and proceed with its deliberations and return a verdict in favor of the defendant.

Thereupon the Jury retired and returned to the Court Room with a verdict in favor of the defendant.

JUROR NO. 6. I would like to tell his Honor it is not a verdict of the Jury. An instructed verdict.

The COURT: It is your verdict under the instructions of the Court.

Mr. NELSON: We reserve an exception to the instruction and the verdict.

Judgment upon said verdict was thereupon entered in favor of defendant and against plaintiffs. Thereafter, and from time to time, upon stipulation of counsel and order of the Court, the term of the court was extended to February 1, 1937, for all purposes connected with the case, and the time for settlement of this Bill of Exceptions was likewise extended to February 1, 1937.

H. C. NELSON
Attorney for Plaintiffs and Appellants.

STIPULATION.

It is hereby stipulated by and between the parties hereto and their respective counsel, that the foregoing Bill [73] of Exceptions contains all the

evidence received by the Court or offered by the respective parties, objections thereto and rulings thereon and exceptions allowed; that the term of court for all purposes of the case was, upon stipulation and order, extended to February 1, 1937, and that the time for the settlement of this Bill of Exceptions was likewise extended to February 1, 1937.

H. C. NELSON
Attorney for Plaintiffs and Appellants.

F. ELDRED BOLAND
KNIGHT, BOLAND & RIORDAN
Attorneys for Defendant and Appellee.

CERTIFICATE.

I, HAROLD LOUDERBACK, Judge of the United States District Court, for the Northern District of California, Northern Division, hereby certify that the foregoing Bill of Exceptions was presented and is hereby settled within the term of the court as extended and within the time allowed by law, stipulation of the parties and the orders of the court. I further certify that I have examined the same and find it true and correct in all particulars; that said Bill of Exceptions contains all of the evidence offered by the parties, admitted by the court, objections thereto, rulings thereon and exceptions allowed, and that the same is hereby settled and

allowed as a true and correct Bill
the above-entitled action.

HAROLD LOUD
Judge of the
District Cour

PLAINTIFFS' EXHIB

253.50

Eureka, Cal

RECEIVED from Leonard N. W
One Hundred Dollar
To apply on 5000.00 20 yr En
policy applied for in The Mutual
New York this date.

$100.00 FRED J.

Whenever the word "Insured" is used in this application it shall be construed as meaning "the person whose life is proposed for insurance."

ALL QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

THIS APPLICATION is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK herein called the Company. All the following statements and answers, and all those that the Insured makes to the Company's Medical Examiner, as a part of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. (The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired.) The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.

FIRST POLICY ISSUED 1-101 Am. 3, 1933

Name in full of Insured: Given Name, Middle Name (if any) and Surname (Print Plainly) Leonard Nathan Winslow

For H. O. Use DEC 6614

1. RESIDENCE OF INSURED — Street and No. 915 H. Street; Town, City or Village Eureka; or ... miles in a ... direction from ... (R.F.D. No.); County Humboldt; State or Province California; Former residences ...

PAID Day 24

Business address of Insured: City Hall; Name of employer of Insured: Eureka; Nature of business of Insured: Electrical Inspector; Length of time engaged 1 yrs. 6 mos.; Present occupation (in detail): Electrical Inspector; Other occupations (in detail): None; Former occupations of Insured are: (If none, state None) Nature Student, Place Oakland Cal

Place of birth of Insured: Eureka, California; Citizen of U S a

Date of birth of Insured: 21 day of May 1911; Age of Insured nearest birthday 24; Sex Male

Send all communications to: Insured 915 H St; To Eureka Calif; P. O. Address Eureka Calif

Good

2. The Insured does not contemplate either (a) going to a foreign or tropical country, or (b) changing his occupation.

3. The Insured has not made, nor does he contemplate making aviation flights, or aeronautical ascensions. (If any exceptions furnish regular aviation form.)

4. No negotiations for other insurance on the life of the Insured, nor any application for reinstatement of insurance on the life of the Insured, are now pending or contemplated.

5. No application or examination for life insurance on the life of the Insured has ever been declined or postponed by any company or association, nor has any company offered a policy differing in plan, amount or premium from that applied for.

Exceptions to 2, 3, 4 and 5, to be noted in No. 6.

6. Details of Exceptions to Questions, 2, 3, 4, 5. (If none, state None) None

7. The following is all the insurance now in force on the Insured's life: (If none, state None)

Name of Company, if Mutual, so state	Amount
Mutual Life of N Y	5000

8. (To be answered if Waiver of Premium applied for.) The total amount of disability income in all companies payable in the event of disability is $ ... annually.

9. (a) Amount $ ... (b) Premiums ... annually.

10. Plan 20 year Endowment (State Only); Waiver of Premium Yes; Double Indemnity Yes

11. It is agreed that if the Company is unwilling to issue a policy for plan and amount applied for, this application shall be for such plan and amount as may be issued by the Company.

12. If Beneficiary predeceases Insured policy will be payable to Insured's estate unless otherwise herein specified or upon Beneficiary's death or Partner's death or dissolution or termination of partnership. If Beneficiary is a minor, payment may be made to parent or guardian. (a) Name (in full) of beneficiary Mrs. Leonard N. Winslow; Relationship Wife and place of residence Eureka Calif; (b) P. O. Address ...; (c) Relationship to the Insured or Insurable Interest ...

If Endowment, state payee at maturity as in Answer 12: None

13. All benefits, options, rights, and privileges conferred by the policy or allowed by Company, including the right to change Beneficiary are reserved to ... except right to ... is reserved to ... (Insert Insured or Beneficiary)

14. $ ... in cash has been paid to the Soliciting Agent and a conditional receipt No. ... dated ..., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from such date, provided this application shall be approved.

16. Will any insurance issued under this application replace in whole or in part, insurance in this or any other Company? No (Answer YES or NO. If yes, give details)

It is agreed that in the event of the self-destruction of the Insured whether sane or insane during the first year following the date of issue of the policy hereby applied for the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the President, a Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promises respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.

This application is made at the instance and request of the undersigned, who, it is agreed, will pay all premiums out of his, her or its funds, and who ratifies the representations, statements, answers and agreements contained in such application and in the statements to Medical Examiner.

Signature in full of Insured: Leonard Nathan Winslow

Dated at Eureka Calif on Dec 18 1934

Signature of Parent or Guardian ... I consent to the above application: ... (Required if Insured a minor under age 15)

(Signature in full of person or persons who will pay the premiums. If a corporation, an officer thereof must sign for corporation, WITH TITLE.) (Paragraph to be executed only when the application is made at the instance and request of some one other than the person to be insured and who will pay the premiums)

I have known the Insured for 2 years and saw him sign this application. So far as known to me any insurance issued under this application will not replace in whole or part insurance in this or any other Company.

Dated Dec 18 1934 Moore Soliciting Agent.

2529

STATEMENTS OF THE INSURED TO MEDICAL EXAMINER

These answers recorded by the hand-writing of the undersigned Examiner, who certifies that he has no interest in this application.

17. Full name? Leonard Nathan Winslow 17. Occupation? Electrical Inspector 18. (a) Date of birth? May 21 1911 (b) Place of birth? Eureka Cal

19. What illnesses, diseases, injuries and surgical operations have you had since childhood?

Name of disease, etc.	Number of Attacks	Date of each	Duration	Complications	Any remaining effects	Date of Complete Recovery
None						

20. State every physician or practitioner whom you have consulted, or who has prescribed for or treated you in the past five years for any ailment, serious or not serious.

Name of physician or practitioner	Address	When consulted	Nature of Complaint. Give full details above under Q. 19.
None			

21. Have you stated in answer to question 19 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No.) Yes

22. Have you stated in answer to question 20 every physician and practitioner consulted during the past five years and dates of consultations? (Ans. Yes or No.) Yes

23. (a) Are you in good health? Yes

(b) If not, what is the impairment? None

24. (a) How much weight have you gained in the past year? None

(b) How much weight have you lost in the past year? None

(c) If any change, state cause. None

(d) How long has weight remained constant? 3 years

25. Is there any impairment of vision in the (a) right eye? None (b) left eye? None (c) If so, state the cause and the degree of impairment in each eye. None

26. Are you single or married? Single

27. (a) To what extent have you used wine, spirits or malt liquors during the past year? (State amount, kind and how much in any one day at the most.) None

(b) Do you use any of them daily? (If so, state kind and amount.) None

(c) Have you been intoxicated during the past five years? (State how often, how recently and duration.) No

(d) If a total abstainer, how long have you been so? always

(e) Have you ever taken cure for alcoholic or drug habit? (If so, give date or dates.) No

28. Have you ever been at a hospital, sanitarium, asylum or cure for treatment, observation or diagnosis? (If so, details.) No

29. Have you restricted your diet in any way within one year? (If so, details.)

	Yes or No	If any of questions 28 to 39 are answered "Yes" give full details.
30. Have you ever raised or spat blood?	No	
31. Have you a rupture or hernia?	No	
32. Have you any bodily deformity?	No	
33. Have you lost any part of arm or leg?	No	
34. Have you any impairment of hearing?	No	
35. Have you ever been told that your urine contained albumin, sugar, casts, pus or blood?	No	
36. Have you ever changed your residence on account of your health?	No	
37. Do you contemplate making any change in your residence? (If so, why?)	No	
38. Has any member of your household suffered from tuberculosis within the past two years? (If so, date when last exposed?)	No	
39. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis or insanity?	No	

40. Family record if living	Age	Condition of health	If dead	Age	Cause of death	How long ill
Father	58	good	Father			
Mother	55	good	Mother			
Brothers Number living	one	17 good	Brothers Number dead	0		
Sisters Number living	0		Sisters Number dead	0		

Age of grandparents	Living	Dead
Father's father		Died age 70
Father's mother		Died age 70
Mother's father		70
Mother's mother	80	

Dated at Eureka Cal State or Province of Cal the 18 day of Dec 1934

Witness E Jones M. D.

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

Leonard Nathan Winslow

Signature in full of the Insured.

33-400A

MEDICAL EXAMINER'S REPORT.

2529

45. (a) How long and how intimately have you known the Insured?
one year

(b) Give some mark of identification.
none

42. General appearance? (Healthy or unhealthy.)
Healthy

43. Apparent age?
21 years.

44. Race? (as white, etc.)
White

45. Weight? (Ordinary clothes)
222 lbs.

46. Did you personally weigh Insured on scales?
Yes
(Scale weight required if over or under weight.)

47. Height by measurement?
6 feet 2½ inches.

48. Measurement of chest at full inspiration?
41 inches.

49. Measurement of chest at deep expiration?
36 inches.

50. Measurement of abdomen at level of umbilicus?
36 inches.

51. State the pulse rate? (Count a full minute. If over 90 or under 60 retake.)
71

52. Is the pulse regular?
Yes
(If not, state type of irregularity and give full description.)

53. Blood pressure: (Auscultatory Method)
(a) Systolic? 130 m. m.
(b) Diastolic? 82 m. m.
(Taken at disappearance of sound)

54. If the Insured is ruptured, examine the hernia and state:
(a) Location and size?
none
(b) Is it easily reducible?
none
(c) Is a suitable truss worn?
none

55. Urinary analysis of specimen voided at this examination.
(a) Clear or turbid? Clear
(If turbid, cause.)
(b) Gravity? 1020
(If under 1010 examine another specimen.)
1020
(c) Reaction? Acid
(d) Presence of albumin?
No
(e) Presence of sugar?
No
(f) Do you know that the Insured passed this urine?
Yes
(If albumin or sugar found send part of specimen to Referee at Agency Office.)

	Yes or No	REMARKS:
56. Do careful inquiry & thorough physical examination show any evidence of past or present disease or functional disturbance of:		
(a) Brain or nervous system?	No	
(b) Heart?	No	
(c) Arteries?	No	
(d) Respiratory organs?	No	
(e) Kidneys or other urinary apparatus?	No	
(f) Digestive organs?	No	
(g) Liver, gall bladder or other abdominal viscera?	No	
(h) Rheumatic or gouty nature?	No	
(i) Syphilitic origin?	No	
(j) Either eye? (If Myopic, is it severe?)	No	
(k) Septic nature in the nose or mouth?	No	
(l) Middle ear? (Any discharge?)	No	
(m) Thyroid, skin or any part of body?	No	
57. Was examination of heart and lungs made on other than bare skin? (If so, explain.)	No	
58. Was any third person present, contrary to Company's rules, while you were asking the Insured questions?	No	
59. Do you know, or suspect, that the Insured ever has, or now uses alcoholic beverages to excess, or any narcotic?	No	
60. After reviewing the answers recorded in the Statements to Medical Examiner and in the Medical Examiner's Report, are you satisfied that every question has been answered fully?	Yes	
61. Do you know of anything in connection with the Insured's physical condition, family history or past health record not already recorded, which would affect his (her) insurability? (If so, give details under "Remarks")	No	

TO BE ANSWERED WHEN THE INSURED IS A WOMAN. Careful inquiry should be made of the Insured before answering these questions.

52. (a) Has she had any menstrual disorder, or symptoms of uterine or ovarian disease, or any disease of the breast?
(b) Has she borne any children; if so, how many and date of last confinement?
(c) Has she ever had any serious troubles in labor?
(d) Has she ever had any abortion or miscarriage? If so, give date and cause of each?
(e) Date of marriage? (f) Is she now pregnant? (If so, what month?)
(g) Has she passed the climacteric?

I certify that I have made this examination of Fill in name of Insured Leonard Nathan Winslow at Eureka Cal on this 14 day of Dec 1934 at 11 A. M. P. M. and that the foregoing questions have been put, and the answers of the Insured recorded as stated.

E. J. Hill
Medical Examiner. M. D.

Important notice to Medical Examiner.

This Report is the property of the Company and must be delivered or mailed promptly by the Examiner to the Agency manager AS INDICATED BELOW. It must not be withheld for any reason. Before signing, the Examiner must review it with care and see that every question is fully answered.

DEC 20 P.M.

Name of Insured Leonard N. Winslow **San Francisco Number** 2529

PAYOR	KIND	PAYT	OUR	AGE	NUMBER	DATE	AMOUNT	PREMIUM	How Paid	Mate
	End	20	1954	23	DATE OF ISSUE	Nov 20 1934 DEC 21 1934	5000	24445 4.05 5.00		
								25350	A	

A. R. A. B. C. to I.

Change Memo.

Change Memo.

Becker	MRA				
1st Check					
2nd Check	A				
Pol. Writer					
Policy Form Etc.					
Pol. Checker					
Gen. Check.					
Photo. Attach.					
Cards Written					
Cards Check.					

W. L. HATHAWAY, MANAGER,
ONE ELEVEN SUTTER,
SAN FRANCISCO, CAL.

The Mutual Life Insurance Company of New York

32-400A (Form 3350. Issue March '28)

For Medical Dept.
by

For Supervisor of Risks

Without Special Benefits

With W. of P. and D. I.

With D. I. only

With W. of P. only

W. of P. and D. I. approved as Applied for

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO FILE BILL OF EXCEPTIONS, EXTENDING TERM OF COURT AND WAIVING ISSUE AND SERVICE OF CITATION AND ORDER ENTERED THEREON.

IT IS HEREBY STIPULATED and agreed between the parties hereto, (1) that plaintiffs above named may have to and including December 1, 1936, within which to prepare, serve and file herein their bill of exceptions; (2) that the term of court within which such bill of exceptions may be prepared and settled be extended to said December 1, 1936; and (3) it further appearing that said plaintiffs have been allowed an appeal herein, it is further stipulated and agreed that defendant and respondent, The Mutual Life Insurance Company of New York, a corporation, hereby waives the issuance of, and service of, a citation on appeal.

Dated, San Francisco, California, October 14, 1936.

H. C. NELSON
Attorney for Plaintiffs.
F. ELDRED BOLAND
Attorney for Defendant. [76]

Pursuant to the foregoing stipulation, it is

Ordered that plaintiffs have to and including December 1, 1936, within which to prepare, serve and file herein their bill of exceptions, and that the term of court within which such bill of exceptions may

be prepared and settled be and it is hereby extended to said December 1, 1936.

Dated: October 14th, 1936.

HAROLD LOUDERBACK
Judge of the United States
District Court.

[Endorsed]: Filed Oct. 15, 1936. [77]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO FILE BILL OF EXCEPTIONS AND EXTENDING TERM OF COURT.

It is hereby stipulated and agreed between the parties hereto, (1) that plaintiffs above-named may have to and including February 1, 1937, within which to prepare, serve and file herein their bill of exceptions, and (2) that the term of court within which such bill of exceptions may be prepared and settled be extended to said February 1, 1937.

Dated, San Francisco, California, November 19, 1936.

H. C. NELSON
Attorney for Plaintiffs.

F. ELDRED BOLAND
Attorney for Defendant. [78]

Pursuant to the foregoing stipulation, it is ORDERED that plaintiffs have to and including February 1, 1937, within which to prepare, serve

and file herein there bill of exceptions, and that the term of court within which such bill of exceptions may be prepared and settled be and it is hereby extended to said February 1, 1937.

Dated, November 21st, 1936.

HAROLD LOUDERBACK
Judge of the United States
District Court.

[Endorsed]: Filed Nov. 21, 1936. [79]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Northern District of California, Northern Division:

You are requested to prepare transcript of the record in the above entitled cause to be filed in the Office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in the said Transcript the following pleadings, proceedings and papers on file, to-wit:

1. Order for Removal from State Court to Federal Court.
2. Notice of removal of cause and filing of record in the United States District Court.
3. Amended Complaint.

4. Answer of Defendant.
5. Stipulation, re: Answer.
6. Verdict of Jury.
7. Judgment on Verdict. [80]
9. Bill of Exceptions.
10. Assignment of Errors.
11. Petition for Appeal and Order allowing Appeal.
12. Stipulation waiving issuance and serving Citation on Appeal.

Said Transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 5th, 1937.

H. C. NELSON
Attorney for Plaintiffs and Appellants.

Receipt of copy of the foregoing Praecipe for Transcript of Record is admitted this 5 day of January, 1937.

F. ELDRED BOLAND
KNIGHT, BOLAND & RIORDAN
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Jan. 8, 1937. [81]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 81 pages, numbered from 1 to 81, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Annie E. Winslow, et al, vs. The Mutual Life Insurance Company of New York, Law No. 1330-S, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Twelve and 05/100 ($12.05), and that the same has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of February, A. D. 1937.

[Seal] WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: No. 8450. United Statees Circuit Court of Appeals for the Ninth Circuit. Annie E. Winslow, and Annie E. Winslow, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased, Appellants, vs. The Mutual Life Insurance Company of New York, a corporation, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed February 2, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth District

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administrax of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

OPENING BRIEF OF APPELLANTS

H. C. NELSON,
Eureka, California
Attorney for Appellants.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (Continued)

No. 8450

In the

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ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administrax of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

OPENING BRIEF OF APPELLANTS

JURISDICTION.

Suit was originally filed in the Superior Court of Humboldt County, State of California, and upon proceedings duly taken upon motion of defendant and appellee herein, a New York corporation, was transferred to the United States District Court, Northern Division of Northern District of California (Trans. 1-3).

U. S. C. A. Title 28, Sec. 71 Judicial Code.

PLEADINGS.

The amended complaint (Trans. page 4-14) sets forth two causes of action; the first alleges an oral contract made on December 14, 1934, to then and there insure the life of Leonard N. Winslow for the sum of $5,000.00 payable to his parents, plaintiffs herein, or the survivor of them, with double indemnity in case of accidental death; that $100.00 was paid on account of premium and balance of $153.50 to be paid when policy was issued; that said insured died on December 18, 1934, by reason of injuries sustained in an automobile accident; the second cause of action alleges a contract of insurance entered into between Fred J. Moore, agent of defendant Company and Leonard N. Winslow for the amounts above stated, effective immediately and the applicant paid on account of premium the sum of $100.00, and agreed to pay the balance due thereon within sixty days; that the agent filled in all the application blanks as to questions answered that were filled in and that the applicant never read nor had he any opportunity to read the application, and the same through carelessness of the agent, was sent in to the San Francisco office of the insurance company without applicant's signature; that the application was returned to the agent to procure the applicant's signature, which was done without the applicant reading the same; that the agent, through inadvertance, mistake, or neglect failed to issue to applicant the form of special receipt referred to in paragraph 14 of said application or to fill in any part of said paragraph; that the applicant did everything that was required of him to make the insurance effective immediately and had no notice or knowledge of any limitations or in-

structions contained in the application or instructions to agents; that applicant's application was approved as to medical, both in Eureka and at the home office; and that the company is estopped from denying liability herein. A full statement of the facts is set forth in the Amended Complaint (Trans. 7-13) and hereinafter pages
By amendment the word "oral" was stricken from the second cause of action (Trans. p. 28). It was admitted that if plaintiff is entitled to recover at all it would be for the sum of $10,000.00 (Trans. page 28).

The answer alleges that applicant signed a written application for insurance which contained certain conditions and limitations on the agent's authority and right to make or modify any contract, sets forth a copy of the application as signed, and claims that by reason or failure to observe the same no liability exists herein (Trans. p. 15-20).

The court on motion of defendant directed the Jury impaneled to try the cause to return a verdict for the defendant. (Trans. p. 87); Judgment was entered upon said verdict (Trans. p. 22-23); and petition for appeal, assignment of errors filed (Trans. 24-25) and Order made allowing appeal. (Trans. p. 26-27).

STATEMENT OF FACTS

Fred J. Moore was at the time of the trial of this cause, and for more than sixteen years continually prior thereto had been the representative of defendant Company in Humboldt County, California, and was well acquainted with Leonard Winslow, and his parents (Trans. p. 28-29).

On December 14, 1934, Fred J. Moore suggested to said Leonard Winslow at Eureka, that he take out another

policy in his Company. Moore had on two occasions shortly prior thereto suggested the same thing, but Winslow seemed not sufficiently interested (Trans. p. 29, 30). Winslow was on date mentioned anticipating a trip to San Francisco (Trans. p. 30), and stated that if he took out any insurance he wanted it to take effect immediately (Trans. p. 36). Winslow paid $100.00 on account of premium which was more than the amount necessary to pay a quarterly premium installment of $67.50 (Trans. p. 35-37). Moore told him the quarterly rate would be $67.20 and to start it he (Winslow) wanted it put on a quarterly basis. They discussed making the insurance effective immediately and Moore told him if the quarterly premium was paid in full, assuming the medical examination and inspection were satisfactory, his policy would be in force immediately. It was the applicant's thought that the insurance would go into force immediately, and that is what Moore believed was wanted. (Trans. 36). Moore stated to him that he could save 6 per cent by paying the premium on an annual basis (Trans. p. 82); that he could pay the remaining amount due, $153.50 within sixty days and he could take the Doctor's examination that day, and if he passed, he would be insured from that day (Trans. 36, 82).

Moore produced an application blank and filled in all answers that were written on the upper half of the application blank. Winslow did not read the questions nor the answers filled in by Moore, nor did he sign the application that day (Trans. p. 33-4).

Winslow was then directed to go to Dr. E. J. Hill of Eureka, for his physical examination, who filled in the an-

swers to the medical questions and forwarded the application blank to the San Francisco office of defendant. (Trans. p. 31).

Winslow withdrew $100.00 from his savings bank account and paid the same to Moore, who gave him an ordinary receipt (Plaintiff's Ex. 1), and which admittedly is not the form referred to in Paragraph 14 of the application.

A few days later the upper half of the blank was returned to Moore with request that he secure Winslow's signature thereto. (Trans. p. 45 and 46). Moore found Winslow at his work and told him that he (Moore) had forgotten to have him (Winslow) sign the application that had been filled in a few days before, and Winslow, again without reading it, signed his name thereto. (Trans. page 33).

Moore returned the application blank to the San Francisco office of defendant, with a memorandum attached, stating "Sorry my carelessness delayed this 'app' going to H. O." (Trans. p. 46).

This application and memorandum was received in the San Francisco office December 18, 1934, and by it forwarded to the New York office where it was received on December 20th. (Trans. p. 46, 47, 57).

The policy to be issued was to be acted upon so as to make it effective as of the age of 23 years for applicant. (Trans. p. 34 and p. 58).

The Home office stamped on the back of the application under "Date of issue" two dates, one of November 20, 1934, the other December 21, 1934. (Trans. p. 57).

Further record entries on the back of the application in-

dicate that it was approved by the Home Office Medical Department on December 20, 1934. (Trans. p. 62).

Winslow was killed in a truck collision on December 19, 1934 (Trans. p. 28) and the following day Moore notified the San Francisco office by wire of this fact. The San Francisco office in turn, and on the same day wired the New York office the same facts. (Trans. p. 56).

It was admitted by the defendant Company that their agents, such as Moore, had authority to tell prospective insureds as a part of their statement to the insured that "this policy can be made effective immediately" (Trans. p. 53); that there are instances when the insured desire such a particular form of policy; and that the Company then leave it to their agent to accept the premium and issue the receipt. (Trans. p. 54).

Moore testified that Winslow did not read or know of the contents of said Paragraph 14, nor of any of the instructions given by the Company to its agents in its printed manuals. (Trans. p. 35 and 40). Moore testified that he had authority to make insurance effective as of date of application. (Trans. p. 38). Winslow did not give any untruthful answers to questions that Moore asked with reference to the application; and he complied with all requests made by Moore, and there was nothing more for Winslow to do to make the policy effective immediately (Trans. p. 39). Winslow had no information from Moore as to type of receipt issued by agents of this Company (Trans. p. 39). Moore did not hand applicant for reading or inspection any documents that might contain rules or regulations of the company with reference to issuance of policies (Trans. 40). Moore had the applica-

tion blank, filled it in, and on its return from San Francisco, had Winslow sign it without ever having read the upper part of it (Trans. p. 40). The balance of the premium as indicated on the receipt was $153.50 which Winslow agreed to pay in sixty days (Trans. p. 40). This amount was tendered to the agent within the sixty day period. (Trans. p. 41).

Moore further testified that it was his practice in similar cases where the insured applied for and it was agreed to have the insurance effective immediately, to issue the form of receipt that he issued in this instance; (Trans. p. 68); that he did not have the printed form of receipt referred to in paragraph 14, but the office has accepted his receipt on that order and noted in blank 14 the cash had been paid (Trans. p. 68); but the Company had accepted many receipts of the kind issued to Winslow, even though their instructions were different (Trans. p. 68-69); that it was his understanding of the attitude and policy of the company as he has conducted the business for years, that if the risk was the right kind and the medical was passed, the policy would be made effective immediately, even though the applicant died before the policy was issued (Trans. p. 70-71); that if the person paid a certain sum and agreed to pay the balance in sixty days the Company would honor that (Trans. p. 72); that the note or sixty day credit was considered cash; (Trans. p. 78); that similarly had he taken a promissory note for the first premium payment it would have been effective immediately; that a note or credit of sixty days is considered cash (Trans. 78); that he has taken notes, or paid the premium himself; that his closing date with the Company is the 25th day of the

month; this application was written on the 14th and it was his intention to pay it on the 25th (Trans. 79). This would come under Moore's ordinary business relationship or course of business with the Company. (Trans. p. 80). That it was his custom to make his cash settlements with the San Francisco office of the Company on the 25th of each month (Trans. p. 81), and at that time he intended to advance for the insured the balance of premium due over the $100.00 he had collected and sent in; that such basis of settlement was considered by the Company as equivalent to cash and policies had been issued on that basis (Trans. p. 80, 81, 82). Moore sent in $100.00 and had an arrangement or custom with the Company, whereby not later than the 25th of the month he could advance the difference necessary to make the policy immediately and this practice has been followed and approved by the Company in other cases (Trans. p. 82); also that Winslow offered to pay the amount that would be necessary to make the policy effective immediately on a quarterly basis and Moore told him he could make a saving of six per cent by placing it on an annual basis (Trans. p. 82).

It further appears from the printed rules that should the agent violate any of such instructions he is liable to dismissal (Trans. p. 63), but in this instance Moore at all times, after receiving the $100.00 from Winslow, up to and including the time of the trial was still in defendant's employ (Trans. p. 29).

It is plaintiff's contention that the defendant Company is responsible for the inadvertance, mistake, and neglect of its agent in not filling out the application blank and issuing the receipt form it required, in view of the admitted author-

ity of the agent to tell prospective insureds that "this policy can be made effective immediately" and that it is estopped from denying liability because of the negligence of its own agent.

The District Court granted defendants motion for a directed verdict (Trans. page 87) and directed the jury to find a verdict in favor of defendant and further ordered that judgment be entered in favor of said defendant upon such directed verdict (Trans. p. 87).

Defendant contends because of the fact than ot answer was made to, and that no part of the blank space provided in question 14 on the application was filled in, the beneficiaries are precluded from claiming that the insured was to take effect immediately, and that therefore the policy was to be effective only when the policy was delivered to insured during his continuance in good health; that the death of applicant prior thereto precluded such policy becoming effective.

Defendant further contends that because Moore failed to receive the full premium in cash and to issue the conditional receipt called for in its printed instructions it is not bound herein. (Trans. p. 73-74).

THE ASSIGNMENTS OF ERROR ARE AS FOLLOWS:

1. That said Court erred in granting the Motion of said defendant for a directed verdict in favor of said defendant.

2. That said Court erred in directing said Jury in said cause to render a verdict in favor of said defendant.

3. That said Court erred in directing that Judgment be

entered upon said directed verdict in favor of said defendant (Trans. p. 25-26).

THE QUESTION INVOLVED.

Under the facts above stated, was the Company bound by the agreement of the agent that the insurance was to take effect immediately, provided applicant passed his medical, in view of the limitations and provisions contained in the application which were not filled in or complied with, due to the inadvertance, mistake, or negligence of the agent and the practices and customs of the insurer with respect to said agent?

The Argument herein applies equally to each and all of said assignments of error and should be so considered.

ARGUMENT.

IN SECURING THE APPLICATION THE AGENT MOORE WAS ACTING FOR THE COMPANY AND NOT THE APPLICANT; AND THE COMPANY CANNOT ESCAPE LIABILITY BECAUSE OF THE AGENT'S UNSKILFULNESS, MISTAKE, CARELESSNESS OR FRAUD IN FILLING IN THE APPLICATION BLANK OR IN FAILING TO ISSUE THE PROPER RECEIPT.

Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222; 20 L. Ed. 617.

American Life Ins. Co. v. Mahone, 21 Wall. 152; 22 L. Ed. 593.

N. J. Mutual Life Ins. Co. v. Baker, 94 U. S. 610; 24 L. Ed. 268.

Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304; 33 L. Ed. 341.

Bank Sav. Life Ins. Co. v. Butler, 38 Fed. 2nd 972 (8th CCA);

Certiorari denied, 282, U. S. 8501; 75 L. Ed. 753.

2 Couch, Ins. page 1533.

Cooley Briefs on Insurance, 2nd Ed. pages 4106-4165.

81 A. L. R. 835 (note and cases cited).

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455, 41 Pac. (2nd) 194.

Pacific Employers Ins. Co. v. Arenbrust, 85 Cal. App. 263; 259 Pac. 121.

Weiss v. Policy Holders L. Ins. Assn. 132 Cal. App. 532; 23 Pac. 2nd 38.

LaMarche v. New York Life Ins. Co. 126 Cal. 498. 58 Pac. 1053.

Vierra v. N. Y. Life Ins. Co. 119 Cal. App. 352; 6 Pac. 2nd 349.

It was specifically shown herein by the testimony of Murray that Moore had authority to tell applicants that the insurance could be made effective immediately provided the medical was satisfactory, and that in such instances and where such insurance was desired by the applicant then the company left it to the agent to see to it that the proper forms of receipt was issued and premium collected. (Trans. p. 53, 54). In fact, paragraph 14 of the application contemplates such immediately effective insurance. Such paragraph is as follows: "Dollars _____ in cash has been paid to the Soliciting Agent, and a con-

ditional receipt No. _____, dated _____, signed by the Secretary of the Company and countersigned by the Agent, has been issued, making the insurance in force from such date, provided this application shall be approved."

The question, therefore, arises as to whether the failure of the agent, under the circumstances shown herein, to fill in paragraph 14 and issue the form of receipt therein mentioned, and in view of the custom or practice of the company in dealing with the agent and its recognizing such practices, precludes recovery herein.

Appellant claims that under the undisputed facts of this case the failure or neglect of the agent is not chargeable against the insured or his beneficiaries, and that the company is estopped from denying liability herein.

Thus in N. Y. Life v. Abromietes, 254 Mich. 622. 236 N. W. 769, it was held that if the agent neglects or omits to give the receipt required and to see to it that the proper indorsement is made on the application, such neglect is not attributable to the insured and the company is liable, for in securing the application, the agent was acting for the company and not the applicant.

Where the agent failed to get the health certificate on renewal of a policy, the company was still held liable, and the agent's negligence would not relieve it of responsibility.

Hoyle v. Grange Life Assur. Co. 214 Mich. 603 183 N. W. 50.

Similarly, it has been held that the mistake of the agent in filling in the wrong residence in application, is the mistake of the company and is not chargeable to the insured.

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455-9. 41 Pac. (2nd) 194.

LaMarche v. New York Life, 126 Cal. 498. 58 Pac. 1053.

The course of business followed by the insurer and its agents may warrant acts in excess of limitations placed upon agents' authority.

The Knickerbrocher Life Ins. Co. v. Norton, 96 U. S. 234; 24 L. Ed. 689.

The instant case is distinguishable from cases cited by insurer in its motion for directed verdict, in that in each of such cases there was no allegation or issue raised that insured had not read the application before signing it, that he had no opportunity to read it, and that he relied upon the agent to do all things necessary in so far as filling in application form and issuing proper receipt was concerned, and that it was the negligence, mistake and inadvertance of the agent that resulted in compliance, if any, with the company's rules. In the absence of such allegations and issue, it would be presumed that the applicant read the application and thus become bound thereby; but such cases are not applicable herein.

WHERE THE INSURED IN GOOD FAITH MAKES TRUTHFUL ANSWERS TO QUESTIONS CONTAINED IN THE APPLICATION, BUT THE ANSWERS THROUGH THE FRAUD, MISTAKE, OR NEGLIGENCE OF THE AGENT ARE NOT CORRECTLY TRANSCRIBED, THE COMPANY IS ESTOPPED TO ASSERT THEIR FALSITY. THIS APPLIES WHETH-

ER THE AGENT IS GENERAL, OR SOLICITING OR MEDICAL EXAMINER, AND HE IS AGENT FOR THE COMPANY AND NOT THE INSURED, THOUGH THE APPLICATION OR POLICY SO STIPULATES.

Lyon v. United Moderns, 148, Cal. 470, 475, 83 Pac. 804.

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455, 458-9, 41 Pac. (2d) 194.

Joyce on Insurance, Sec. 489.

Cooley's Briefs on Law of Insurance, Vol. 3, p. 2594.

Gayton v. N. Y. Life Ins. Co. 55 Cal. App. 202, 206. 202 Pac. 958.

Westfall v. Metropolitan Life Ins. Co. 27 Cal. App. 734. 151 Pac. 159.

With reference to defendant's claim that applicant is conclusively presumed to have notice of the limitations placed upon the agent by the language of the application and that the applicant cannot assert he did not read it, attention is called to the following language in Vierra v. N. Y. Life Ins. Co. 119 Cal. App. 352, at 360 (6 Pac. 2nd 349).

> "While, as a general rule, a party to a contract . . . will not be permitted to urge that he did not read it before he affixed his signature thereto, and that he was ignorant of its contents, and supposed them to conform to what he had agreed with or represented to the adverse party or his agent, the application of this rule has been almost universally denied where

sought to be applied to the business of insurance as it is conducted in the United States. (Note, 9 A. St. Rep. 232, citing numerous cases, including Menk v. Home Ins. Co., 76 Cal. 50 (9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117).)"

Instances where failure to read the application for insurance was excused are found in:

McKay v. N. Y. Life, 124 Cal. 270, 56 Pac. 1112.

Maxson v. Llewelyn, 122 Cal. 195, 9, 54 Pac. 732.

LaMarche v. N. Y. Life, 126 Cal. 498, 58 Pac. 1053.

The requirements of the Company's rules and instructions to agents cannot bind the insured unless it is shown that the insured had notice or knowledge thereof; and the failure of the agent to comply therewith in making out the application or issuing the receipt is not chargeable to the insured.

Roe v. National Life Ins. Assn., 137 Iowa, 696, 115 N. W. 500.

New York Life Ins. Co. v. Abromietes, 254 Mich. 622, 236 N. W. 769.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303; 273 Pac. 1093.

Vierra v. New York Life Ins. Co., 119 Cal. App. 352, at 359, et seq; 6 Pac. 2nd 349.

2 Couch Insurance, Sec. 522A.

PAROL EVIDENCE WAS ADMISSIBLE TO SHOW THAT IT WAS AGREED BETWEEN THE INSURED

AND THE AGENT THAT THE POLICY TO BE ISSUED WAS TO TAKE EFFECT IMMEDIATELY, SUBJECT TO PASSING MEDICAL EXAMINATION; THAT THE MATTERS CONTAINED IN QUESTION 14 OF THE APPLICATION WERE NOT CALLED TO APPLICANT'S ATTENTION; THAT THE APPLICANT DID NOT READ THE APPLICATION BEFORE SIGNING IT, AND DID NOT KNOW OF THE COMPANY'S DIRECTIONS TO AND REQUIREMENTS OF ITS AGENTS IN SUCH MATTERS; THAT IT WAS THE NEGLIGENCE, MISTAKE, OR INADVERTANCE OF THE AGENT THAT CAUSED THE FAILURE TO COMPLY WITH THE COMPANY'S INSTRUCTIONS, AND BY REASON THEREOF THE COMPANY IS ESTOPPED FROM DENYING LIABILITY HEREIN; THAT THE BUSINESS PRACTICES OF THE COMPANY AND ITS SAID AGENT AND THE VARIOUS AND SUCCESSIVE STEPS TAKEN BY THE AGENT MADE EFFECTIVE ON THAT DATE, THE INSURANCE APPLIED AND PAID FOR BY WINSLOW. SUCH EVIDENCE STANDING UNREFUTED, THE COURT ERRED IN DIRECTING VERDICT AND JUDGMENT FOR DEFENDANT.

Vance, in his work on Insurance under the title of "Waiver and Estoppel," page 356, lays down the rule as follows:

> "It is clear that there is fraud on the part of the insurer's agent in pretending to make a valid contract when by its terms he knows it to be invalid, and that the insured, if acting in good faith, has been misled

into paying money for a contract which by its terms conferred no benefit whatever upon him."

And the learned author goes on to discuss the question whether the insured can inforce such a contract in an action at law without first reforming it in equity, as follows:

"The whole contest however voluminously waged in the courts narrows itself to this single issue: Does the admission of such evidence have the effect of altering or contradicting a term of the policy and thus violating the parol evidence rule? * * * * In speaking of this famous rule, Justice Miller, in Union Mutual Life Insurance Company v. Wilkinson, 13 Wall. 222, makes the following sound observations: 'The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which cannot always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. **The written instrument does not always represent the intention of both parties and sometimes it fails to do so as to either, and where this has been the result of accident, mistake or fraud, the principle has long been recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed as**

best suits the purpose of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the 'statute of frauds,' become the instrument of the very fraud it was intended to prevent. In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought and it is not denied that he signed the instrument and that the representation is untrue. But the parol testimony makes it clear beyond a question that the party did not intend to make that representation when he signed the paper and did not know that he was doing so, and in fact had refused to make any statement upon that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself or by some one who was his agent alone in the matter, and forwarded to the principal office of the defending corporation and acted upon as true by the officers of the company,it is easy to see that justice would authorize them to hold him to the truth of the statement and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not after the event be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If, however, we suppose the party making the

insurance to have been an individual and to have been present when the application was signed, and soliciting the insured to make the contract of insurance, and that the insurer himself wrote out oll these representations and was told by the plaintiff and his wife that they knew nothing at all about this particular subject of inquiry and that they refused to make any statement about it, and, yet knowing all this wrote the representations to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the greatest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff and that the defendant knew that it was not when he made the contact, and that it was made by the defendant who procured plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppel or as it is sometimes called estoppel in pais. The principle is that where one party by his representations or his conduct induced the other party to the transaction to give him an advantage which it would be against equity and good conscience for him to assert, he should not, in a court of justice, be permitted to avail himself of that advantage."

And the court goes on to show that the doctrine of equitable estoppel is now applied to a direct action on the contract.

Vance goes on in the following language:

"The modern decisions fully sustain this proposition and they seem to us to be founded in reason and justice and meet our entire approval. This principle does not admit parol testimony to vary or contradict that which is in writing but it goes on the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances as to estop the other side from using it or relying on its contents; not that it may be contradicted by parol testimony but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

"It is believed that nearly all of the states have accepted the doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the insurer is prevented from obtaining the benefit of a term of his written contract, provided that term invalidates the policy in its inception (Citing cases page 362)."

The rule laid down by Vance, as above indicated, is clearly stated in the case of Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617. In that case an action was brought on a life insurance policy. The insurance company raised the defense that the insurance contract was void because the applicant had answered falsely certain material questions in the application which he had signed. By the terms of the policy it became void if any of these representations proved to be untrue. The defendant company objected to the introduction of parol testi-

mony regarding the action of the agent in soliciting the application. This, according to the report, was the very first question raised by the attorneys for the insurance company in their brief. They said the question to be discussed is: "Had the Court and jury under any pretense whatever any right to take into evidence the parol statements made by the applicant or others which were contemporaneous with the signing of the application?" They go on and say: "We have this anomalous position in a court of law. The plaintiff sues on a written contract signed by himself as one of the parties. He asks a recovery according to the terms of that contract and yet in the same breath is permitted by the court to contradict and vary the terms of this written contract by proving what was stated by himself and others at and before the signing of the same." The Supreme Court of the United States, speaking thru Justice Miller, overruled these objections in the language stated in the excerpt from Vance quoted above. The Court then continues:

> "Whose agent was Ball in filling up the application? . . . It is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state and having in that state its principal business office send these agents all over the land with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and the necessity of life insurance and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on

the premiums thus obtained and the policies are delivered at their hands to the insured. The agents are stimulated by letters and instructions to activity in procuring contracts and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said and done in making the contract. Has he not the right so to regard him? It is quite true that the reports of judicial decisions are filled with the efforts of those companies, by their counsel, to establish the doctrine that they can do all of this and yet limit their responsibility for the acts of these agents to the simple receipt of the premiums and delivery of the policy, the argument being that as to all the other acts of the agent he is the agent of the insured. This proposition is not without support in some of the earlier decisions on this subject, and at a time when insurance companies waited for parties to come to them to seek insurance or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to a system of selling policies thru agents which we have described would be a snare and delusion leading as it has done in numerous cases, to the grossest frauds of which the insurance corporations received the benefits, and the parties, supposing themselves insured, are the victims. The tendency of the modern decisions in this country is steadily in

the opposite direction. **The powers of the agents are, prima facie, co-extensive with the business intrusted to their care and will not be narrowed by limitations not communicated to the person with whom he deals (Citing cases.) An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal. (Citing cases.)"**

This case was approved in the later decisions of the Supreme Court of the United States. See American Life Insurance Company v. Mahone, 21 Wall. 152, 22 L. Ed. 593.

The same rule was laid down in N. J. Mutual Life Ins. Co. v. Baker, 94 U. S. 610, 24 L. Ed. 268, and Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341.

In the case of Association v. Wickham, 141 U. S. 564, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in the case of McElroy v. British American Assurance Company, 94 Fed. 990, the court said:

> "We have no disposition to overrule or qualify in any way the general rule and familiar doctrine, inforced by this court from the case of Hunt v. Rousmanier's Admrs., 8 Wheat. 174, decided in 1823, to that of Seitz v. Refrigerator Co. (decided at the present term), 141 U. S. 510, that parol testimony is not admissible to vary, contradict, add to or qualify the terms of a written instrument. The rule, how-

ever, is subject to numerous qualifications as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed." (Citing Ins. Co. v. Gray, 43 Kas. 497, 23 Pac. 637, and other cases).

"In the McElroy case, supra, the court said, speaking thru Judge Morrow: **'The insured had a right to rely upon the agent performing his duty of making his contract in conformity with the information given and the agent's failure so to do, whether the result of a mistake or a deliberate fraud, cannot operate to the prejudice of the insured.'** The contract of insurance is pre-eminently one that should be characterized by good faith on both sides. * * * * In Kister v. Insurance Company, 128 Pa. St. 553, 18 Atl. 447, a policy was issued upon an application in which the agent had written down other answers than those given him by the applicant and the insured signed the application in ignorance of this fact. The Supreme Court said: "A copy of this application accompanied the policy and it is argued that Kister (insured) could and ought to have read it and if he had done so he would have seen that the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud on the part of the company, imposed any absolute duty upon Kister to read the policy when he received it, altho it would have been an act of prudence to have done so.' (Citing cases). **One**

thing is certain, however; the company cannot repudiate the fraud of the agent and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination. Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant decided to make it anything different it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In the recent Federal case of Campbell vs. Business Men's Assn., 31 Fed. (2nd) 571, and decided in May, 1928, and which was an action on a life and health insurance policy, the insurance company contended that there was a misrepresentation of fact in the application made by the insured in this: That he had answered "No" to a question as to whether he had previously been rejected for insurance when as a matter of fact he had been rejected. It appeared as a fact in the case that the agent wrote the application. The court said in discussing the case:

"The applicable and controlling rule in such cases was announced in Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, quoting from said decision as follows: 'Hence when these agents in soliciting insurance undertake to prepare the applications of the insured or make any representations to the assured as to the character or effect of the statements of the application they will be regarded in do-

ing so as the agents of the insured. * * * To permit verbal testimony to show how this was done does not contradict the written contract, tho the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company by the acts of their agent in the matter are estopped to set up that it is the representation of the assured.' ".

In the case of GLOVER V. BALTIMORE NAT. FIRE INS. CO., 85 Fed. 125, the Court said:

"The grounds upon which the court below was moved to reject the testimony were that all conversations between the parties were merged into the written contract and that parol evidence was inadmissible to show that the intent and meaning of the parties was different from what the words of the contract expressed and authorities of commanding weight are cited to support the proposition that when a policy contains plain and unambiguous language which has a settled legal construction, neither party can by parol evidence be permitted to prove that the instrument does not mean what it says. This motion proceeded upon a misconception of the object for which the testimony was offered. It is not for the purpose of changing the terms of the contract but to show that the circumstances were such that at the time the contract was entered into the insurer actually knew all the facts relating to the risk and is estopped by such actual knowledge from setting up in avoidance of the policy either the mistake or omission to state those

facts from its face. . . . The principle does not admit oral testimony to vary or contradict that which is in writing but goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it." . . . . I May Insurance, Sec. 144, quoting from Am. Lead Cases where an application had been signed by the assured . . . This principle which seems to have the sanction of all the writers upon insurance is consonant with sound reason. All of the business of insurance is done thru agents who are presumed to know and do know better than the community at large the requirements of their companies. . . . That oral testimony may properly be offered to prove facts tending to create estoppels of this nature (estoppels in pais) is well settled in numerous cases of the highest authority. Citing Ins. Co. vs. Wilkinson, 13 Wall. 222; Eames vs. Ins. Company, 94 U. S. 621; Ins. Co. vs. Mahone, 21 Wall. 152."

In ROE vs. NATIONAL LIFE INS. CO., 137 Iowa, 696, 115 N. W. 500, it was held in an action on a life insurance policy that parol evidence was admissible to show that the agent prepared the application and represented it to accord with insurer's rules and regulations and to estop insurer from availing itself of the falsity of the statements contained therein. The Court said:

"If this association was deceived this was owing to the neglect or wrongful manner of its agent in preparing the application under the sanction of its secretary and not because of any deception practiced by the de-

ceased. For this reason the defendant is estopped from setting up the falsity of the answers in the application as a defense. Stone vs. Ins. Co. (Iowa) 28 N. W. 49; Donnely vs. Ins. Co. (Iowa), 28 N. W. 607. The above are fire insurance cases but the same rule is applicable to companies or associations insuring lives. Con. Ins. Co. vs. Chamberlain, 132 U. S. 304; Temmink vs. Ins. Co., (Mich.) 40 N. W. 469 . . . The evidence concerning the preparation of the application was received not to vary or contradict a written instrument but for the sole purpose of estopping the association from availing itself of the falsity of the statements contained therein as a defense and was admissible."

In cases of applications and agreements for insurance coverage effective immediately, the death of the applicant before policy in fact may have issued does not relieve the Company of liability.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303. 273 Pac. 1093.

Cordway v. People's Mut. Life Ins. Co., 118 Cal. App. 530, 533. 5 Pac. (2d) 453.

Meyer v. Johnson, 7 Cal. App. 2d, 604, 618; 46 Pac. (2d) 822. See also note 81 A. L. R. 332 at 336.

As to the payment of the first premium it appears that applicant paid $100.00 in cash; more than sufficient to pay on a quarterly basis to make the insurance effective immediately as intended, and that balance to be paid in

sixty days, with the agent holding himself responsible, was equivalent to cash, and so considered by the Company.

> "As between insurer and insured, although agents are forbidden by the insurer to take notes for first premiums, the taking of a note will constitute a payment thereof, where the custom or common practice is for the agent to take the note in his own name and charge it to himself in his account with the company, being responsible for its collection."
>
> **Vierra v. New York Life Ins. Co.,** 119 Cal. App. 352 at 360; 6 Pac. 2nd 349.

These salient facts remain; that the applicant understood and was told by the agent that he was temporarily insured; that the agent was authorized to so act; that the deceased paid sufficient premium to make the insurance effective immediately as agreed; that the agent filled in the application and the applicant signed the same without reading it, relying upon assurances and integrity of the agent; that the applicant had no notice or knowledge of any instructions to agent as to procedure or of any limitations upon the agent's authority; that the agent failed to take such action or follow such instructions as were necessary to make it effective immediately and such failure and negligence was without any fault or connivance, upon the part of the applicant.

Where such issue is directly raised, and no effort is made to deny such facts, the insurance company will not be heard to say that the deceased was not temporarily covered.

Vierra v. N. Y. Life Ins. Co., supra.

CONCLUSION.

From the foregoing facts and law it appears:

(1) That said application for insurance was solicited by an agent of the defendant company.

(2) That applicant and defendant's agent understood and agreed that the policy of insurance was to become effective immediately, provided applicant passed the necessary medical examinations. This he in fact did, and the medical department of the Home Office approved such application.

(3) That the agent had authority to state to applicant that the policy could be made effective immediately; and the Company left it to the agent to see that the proper receipt was issued.

(4) That the agent actually wrote in the answers to the questions that were answered and applicant never read or was any opportunity given or request made of him that he read the answers.

(5) That applicant offered to pay the premium necessary to make it effective immediately on a quarterly basis, and in fact paid the agent more than the amount necessary for such purpose.

(6) That it was due to the inadvertance, carelessness or neglect of agent that the requirements of the application in not filling in paragraph 14 of the application, or in not issuing proper receipt therefore were not complied with.

(7) That it was due to the carelessness and neglect

of the agent that applicant did not sign the application when first made out; and later applicant did not read the questions or answers therein when he did sign it.

(8) That applicant had no knowledge of any instructions or limitations on the agent's authority in filling in the application, issuing receipts, or other conditions imposed by the insured on making the insurance effective immediately.

(9) That the applicant did everything that was required of him in dealing with the agent, and all in his power to make the insurance effective immediately, was not guilty of any deceit or fraud.

(10) That under the business practices of defendant Company the agent Moore had been accustomed to issuing receipts in same general form as issued herein and not as required in paragraph 14, and the same had been recognized as providing insurance effective from date of application; that cash remittances and monthly settlements made not later than the 25th of each month, whereby the agent advanced necessary cash, if he had not collected full amount, were considered by the company to be full cash premium payments to make policy effective immediately.

(11) That sufficient money was paid to make the policy effective immediately upon a quarterly premium basis, and the Home Office actually approved the application as shown by indorsements on application.

(12) That under the facts and law defendant Company is estopped and cannot escape liability because of the neg-

lect or failure of the agent to comply with its instructions; and that the verdict and judgment directed for defendant herein was erroneous.

Respectfully submitted,

N. C. Nelson

Attorney for Plaintiffs and Appellants.

1 2

No. 8450

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

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Appellee.

BRIEF FOR APPELLEE.

FACTS.

Because neither the facts nor the law relied upon by the trial court when granting appellee's motion for a directed verdict in its favor are stated in appellants' brief, it becomes necessary here to so state them to that extent.*

The application for insurance signed by Leonard Winslow (Tr. 90) contained the following stipulation:

> "The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's con-

*All italics herein have been supplied.

tinuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; *except in case a conditional receipt shall have been issued as hereinafter provided.*"

Following this stipulation, the application contained fourteen numbered paragraphs containing certain information concerning the insurance applied for. The fourteenth numbered paragraph refers to the *conditional receipt* mentioned in the stipulation above quoted, as follows:

> "14. $..... in cash has been paid to the Soliciting Agent and a conditional receipt No..... dated ....., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from such date, provided this application shall be approved."

Following these fourteen numbered paragraphs is another stipulation as follows:

> "It is agreed that *no Agent* or other person except the President, a Vice-President, or a Secretary of the Company *has power* on behalf of the Company to bind the Company by making any promises respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance, or to extend the time for payment of a premium, or *to waive any* lapse or forfeiture or any *of the Company's rights or requirements.*"

Then comes the signature of the applicant, Winslow, and that of Moore, the agent.

The total annual premium on the policy amounted to $253.50 (Tr. 48). The application stipulated the premium was to be paid annually (Tr. 90, paragraph 9). Only $100 was paid by Winslow, for which Moore issued a receipt as follows (Tr. 89, Exhibit 1):

"253.50 Eureka, Calif. 12/14 1934.

Received from Leonard N. Winslow

One Hundred Dollars

To apply on 5000.00 20 yr. Endowment policy applied for in The Mutual Life Ins. Co. of New York this date.

$100.00 Fred J. Moore, Agent."

This receipt is admittedly not the receipt referred to in paragraph fourteen of the application; either in form or amount (Appellant's Brief, 7).

The application, unsigned, was first received in the San Francisco office of the appellee on December 15, 1934, but was returned to Moore because it lacked the signature of Winslow and was returned by Moore to the San Francisco office of appellee, signed by Winslow, on December 18, 1934 (Tr. 45, 46). Winslow had, however, signed the medical report on December 14, 1934 (Tr. 90). Winslow died on December 18, 1934. No money was sent with the application, nor until after December 20, 1934. On that day Moore wrote the San Francisco office as follows (Tr. 47):

> "Please send proof of death form for above party who was accidentally killed last evening as per newspaper clipping herewith. Also the above party applied for a $5000.00 20-year endowment Dec. 14, 1934. Applicant paid me $100.00, and had agreed to pay balance of premium within 60 days."

This was the first intimation that any money had been paid (Tr. 48).

Applications for insurance are considered and passed upon and policies issued only in the Home Office of the appellee in New York. Neither Moore nor the San Francisco office, nor anyone there, had any authority to do more than forward the application to New York (Tr. 47, 62). The application was forwarded to New York by the San Francisco office on December 18, 1934 (Tr. 47), the day Winslow died.

The actual authority of the soliciting agents of the appellee is contained in the "Agents Instruction Book". These rules with respect to the effectiveness of the insurance are, in part, as follows (Tr. 77, 83, 63):

> "The attention of Agents is particularly called to the clause in the application by which the applicant agrees that the insurance 'shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who herein agrees to pay the premium, during the insured's continued good health, and unless and until the first premium shall have been paid during the insured's continuance in good health.' *This applies to all cases except where the full premiums are paid in cash and conditional receipt issued and such premiums immediately forwarded to the Agency,* and suggests an argument for urging payment of premiums with the application."
>
> "130. Not to be delivered. A policy must not be delivered, nor the initial premium accepted, unless the applicant is in good health and his occupation as stated in application remains unchanged. This rule applies regardless of the fact that the

premium may have been previously collected. In any case of change in the applicant's health or occupation, the policy must be returned at once to the manager with a statement of facts, that he may ascertain from the company whether the policy should or should not be delivered, and if to be delivered, upon what conditions."

"Premiums Paid with Applications. *The company will not recognize initial premiums paid in advance of delivery of policies unless the full premium is paid in cash, a conditional receipt is issued, and the full premium is forwarded to the Agency.* When the full cash premium is paid at the time application is made, the amount must be entered in the portion of the application beginning 'Dollars ....., in cash has been paid to the Soliciting Agent', and the number of the conditional receipt noted in the proper space. Agents may accept initial premiums between the time application is made and the policy is delivered, provided that a conditional receipt is duly issued and further provided that the applicant has continued in good health and all other conditions, including applicant's application, having remained unchanged. *The full amount of the premium and a statement covering details of payment should be sent immediately to the Agency. Any representative who fails to comply with this rule will be liable to immediate dismissal.*"

It is true, Moore thought his authority a little broader than indicated by the rules of appellee; that is, he thought he could either pay the *full* premium himself or pay the *full* premium part in cash and part by note.

He testified (Tr. 78, 79, 80):

"Mr. Boland. Q. Is that credit equivalent to a note, or must you have a note?

A. A note——

Q. Without a note it is not good?

A. Cash or a note.

Q. Either cash or a note?

A. Yes.

Q. Didn't you get a note here?

A. No."

"Q. In view of the statement, have you ever done this before in which you have accepted extended credit for sixty days?

A. I have taken the notes or paid the premiums myself.

Q. Have you ever done it before where you didn't take a note, but did give credit?

A. Yes, by paying the premiums, myself. I explained in testimony this morning how I wrote this application."

"Where it is intended for the policy to go into effect the day that the applicant takes the medical examination, you either have to send the full premium in cash to the Agency Office or part cash and a note for the balance. That was your testimony, was it not?

A. Yes.

Q. And that is correct?

A. Yes.

Q. *So that in order to make the policy go into effect the day that the applicant takes the medical examination, the full premium must reach the Agency Office in San Francisco either in cash or cash and a note, that is correct?*

A. *Yes.*

Q. You did not receive a note in this case?

A. No.

Q. And you sent only the $100—Was all that was ever sent?

A. Yes."

Of course, it is nowhere claimed that the *full* premium was paid either in cash, or by Moore, or by cash and note.

There can be no claim of ostensible authority (California Civil Code, Sec. 2317), in view of the allegation of the complaint (Tr. 11), which alleges:

> "That said applicant did not at any time, have any knowledge or information as to said agent's authority to enter into any contracts for life insurance for or on behalf of said defendant, except the statements and representations of said agent with reference thereto, as herein set forth."

Appellant concedes that either actual or ostensible authority was necessary by the allegation of the complaint (Tr. 12), as follows:

> "That the said agent Fred J. Moore then and there had both actual and ostensible authority to make said contract of insurance for and on behalf of said defendant, as aforesaid."

Of course, no policy of insurance was issued, since news of Winslow's death reached San Francisco on December 20 (Tr. 47). In fact, there could be no assurance that a policy would ever be issued. Moore testified (Tr. 69, 70):

> "The fact a man pays me the full amount is no guarantee on my part I could assure him he would get a policy. That money could be returned for reasons I do not know anything about, and the

company would request I notify Mr. So-and-so the company declines the risk. I am not notified of the reasons."

It is pertinent to say that all conversations between Moore and Winslow occurred before the application was signed and sent to San Francisco (Tr. 42).

The $100.00 paid at the time of signing the application was tendered by Moore to appellant on December 26, 1934, and rejected (Tr. 42, 43).

Upon these facts the appellee moved the court to direct a verdict in its favor (Tr. 73-74), which motion was granted (Tr. 87).

THE ISSUES.

Upon the pleadings and the facts, we believe the issues are properly presented by the appellee's motion for directed verdict (Tr. 73), as follows:

"1. There is no evidence to sustain a finding or verdict that any contract of insurance or otherwise was entered into, as alleged in either the first or second count of the complaint.

2. Fred J. Moore had no power or authority to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

3. Fred J. Moore did not purport or attempt to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

4. The written application signed by Leonard N. Winslow was a written offer to enter into a

contract of insurance according to its terms, which offer was never accepted according to its terms.

5. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be effected until a policy was issued and delivered to Leonard N. Winslow during his continuance in good health, and no such policy was ever delivered.

6. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be effected unless the first premium thereon was paid in full during the good health of Leonard N. Winslow, and said first premium was not so paid in full.

7. There was no ratification of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

8. There was no estoppel of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

9. The delivery of a policy and the payment of the first premium conforming to the written application, was essential to any contract between said Leonard N. Winslow and defendant.

10. The death of said Leonard N. Winslow prior to the consummation of a contract by delivery of the policy and payment of the full premium, destroyed the subject matter of the negotiations for a contract."

SUMMARY OF ARGUMENT.

First: The authority of Moore as soliciting agent was severely limited by the written application. The policy could not go into effect until the application was accepted by the officers of the appellee and until the premium was paid during applicant's good health, unless the full premium was paid in advance and a conditional receipt, signed by the secretary, issued. Moore had no authority, actual or ostensible, to waive this condition or enter into any contract. Furthermore, all negotiations were merged in the application. The principles applicable have been so recently and exhaustively discussed by this and other courts, that appellee, in the interest of brevity, has omitted personal argument and merely cites and discusses these cases.

Second: Winslow had notice of these limitations because they were contained in the application. Failure to read the application is no excuse. It was Winslow's duty to read it.

Third: There was no intent or agreement that the policy should be effective immediately or until the application had been accepted and a policy had been issued and delivered, and the full annual premium paid.

ARGUMENT.

FIRST.

THE AUTHORITY OF MOORE AS SOLICITING AGENT WAS SEVERELY LIMITED BY THE WRITTEN APPLICATION. THE POLICY COULD NOT GO INTO EFFECT UNTIL THE APPLICATION WAS ACCEPTED BY THE OFFICERS OF THE APPELLEE AND UNTIL THE PREMIUM WAS PAID DURING APPLICANT'S GOOD HEALTH, UNLESS THE FULL PREMIUM WAS PAID IN ADVANCE AND A CONDITIONAL RECEIPT, SIGNED BY THE SECRETARY, ISSUED. MOORE HAD NO AUTHORITY, ACTUAL OR OSTENSIBLE, TO WAIVE THIS CONDITION OR ENTER INTO ANY CONTRACT. FURTHERMORE, ALL NEGOTIATIONS WERE MERGED IN THE APPLICATION. THE PRINCIPLES APPLICABLE HAVE BEEN SO RECENTLY AND EXHAUSTIVELY DISCUSSED BY THIS AND OTHER COURTS, THAT APPELLEE, IN THE INTEREST OF BREVITY, HAS OMITTED PERSONAL ARGUMENT AND MERELY CITES AND DISCUSSES THESE CASES.

In support of the motion for a directed verdict, appellee cited the court, and the court granted the motion upon the authority of, the following cases:

Bankers Reserve Life Co. v. Yelland (C. C. A., 9), 41 Fed. (2d) 684;

Jefferson Standard Life Ins. Co. v. Munthe (C. C. A., 9), 78 Fed. (2d) 53;

Braman v. Mutual Life Ins. Co. (C. C. A., 8), 73 Fed. (2d) 391;

New York Life Ins. Co. v. McCreary (C. C. A., 8), 60 Fed. (2d) 355;

Brancato v. National Reserve Life Ins. Co. (C. C. A., 8), 35 Fed. (2d) 612;

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185;

New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. Ed. 934.

These cases so thoroughly cover all of the issues raised that independent and personal argument would seem unnecessary and are omitted in the interest of brevity.

The first case to be considered is the decision of this honorable court, in *Bankers Reserve Life Co. v. Yelland,* 41 Fed. (2d) 684. In that case Yelland was solicited for a policy of insurance in the appellant company. Whereupon he signed an application containing the following stipulation:

> "That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium, and delivery of the policy to the applicant in person, during his lifetime and while in good health."

This court also states:

> "In payment of the first premium thereon he executed his promissory note for $237.60 and delivered it to Hickman together with the application. Pursuant to the understanding then had, on November 26th, he submitted to a medical examination by a local physician duly designated by and acting for defendant. Seemingly the examination was satisfactory to the physician, but before either the application or medical report reached defendant's home office at Omaha, Neb., namely, on November 28th, Yelland died from injuries accidentally suffered on the preceding day."

At the time of the signature to the application, Yelland was hesitant. Whereupon the appellant's agent, as stated by the court, represented:

> "Well, it [insurance] will go into effect right now, providing you pass Dr. Rand's examination. There is no question about it."

For the purpose of the case the court was willing to assume that the agent had authority to make the representation and also that the agent's representation, but for the stipulation in the written application, would be effective. This court held that the claimant was bound by the stipulation in the application and that there was no equitable estoppel, saying:

> "Nor are we able to see of what avail to plaintiff the doctrine of equitable estoppel can be. In the first place, the transaction would seem to be wanting in the essential elements of estoppel. By the testimony it is shown that Yelland was disinclined to apply for insurance until he could conveniently spare the money for the first premium, and hence had it not been for Hickman's alleged representations he would have deferred making application, and consequently would have been without insurance at the time of his death. True, because of such representations he executed the note, but that was promptly tendered back by the defendant. How, then, can it be said that he acted upon the representations to the prejudice of himself or the plaintiff? But if on that point a different view could be taken, to recognize the doctrine as a sufficient basis for plaintiff's claim would in effect be to subvert the general rule that where parties have put their contracts into writing, the written instrument, if clear, is conclusive as against all preceding oral agreements and understandings. For it is to be presumed that in

> all cases where a party seeks to establish an oral agreement as against a subsequent writing, the alleged oral agreement is the more favorable to him."

Here the facts are analogous, because all negotiations and representations preceded the signature of the application (Tr. 42).

The case of *Braman v. Mutual Life Ins. Co.,* 73 Fed. (2d) 391, is identical with that before the court. It involves the same company, the same form of application and the same facts. In that case the court states:

> "An application for life insurance with double indemnity in case of accidental death was signed by Glenn D. Braman. There was testimony on behalf of plaintiffs, and as the court directed a verdict for the defendant, we must accept it as true, that Stockton and Gettman told plaintiffs, who were present at the time, and their son, that as soon as the premium was paid the insurance would be in effect, subject to the passing by the applicant of a satisfactory medical examination."

In connection with the application, applicant gave the soliciting agent his promissory note for the premium. The court then states the further fact:

> "The physical examination indicated that the applicant was an insurable risk. The papers were received at defendant's home office in New York City, December 23, 1931, and on that date the application was approved by defendant's home office without knowledge of the prior death of applicant. In the meantime, on December 22, 1931, and after he had learned of the death of applicant,

Gettman sent a draft for the amount of the first premium to the Sioux City office of defendant. This draft was returned to Gettman.

The application which was signed by Glenn D. Braman was on the printed form provided by the defendant, and recited that, 'The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary, or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.'

Following this recital, appear fourteen paragraphs consecutively numbered.''

As stated, the application was the same as that here involved, and with reference to the *fourteenth* paragraph the court says:

''The fourteenth is as follows:

'$..... in cash has been paid to the Soliciting Agent and a conditional receipt No. ....., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from this date, provided this application shall be approved.'

Following the foregoing fourteen separately numbered paragraphs, the application contains provision that, 'It is agreed that no Agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respect-

ing benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.'

"Testimony on behalf of plaintiffs was to the effect that the agent Stockton said he did not have his receipt book with him, and on that account he made out a receipt on a piece of paper, using for the purpose the back of a blank check or note, and this was delivered to applicant. This receipt was not produced at the trial, but proper foundation being laid, secondary evidence was received as to its contents. In substance, *the receipt acknowledged receipt of the first annual premium, and recited that the policy would go into effect at once, or when the medical examination had been taken. It was not signed by the secretary of the company.*

At the close of all the testimony, the court directed a verdict for the defendant, and from the judgment entered thereon this appeal has been perfected."

The appellant contended that there was a completed policy of insurance. In that connection the court says:

"But it is to be noted that the application provides that the proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who therein agrees to pay the premiums during the insured's continuance in good health. This was a condition precedent to the taking effect of the policy unless, as we shall later consider, there was effected a contract of present insurance."

In holding there was no contract of insurance, the court first upholds the restriction upon the power of the agent, saying:

> "These restrictions on the power of the agent, being contained in the application signed, were notice to the applicant of the lack of authority of the soliciting agent to make any contract of insurance except as authorized by the provisions of the application itself."

The court then says:

> "It is therefore important to determine what authority to bind the company by a contract of interim insurance is conferred upon the soliciting agent by the application. All that is said on that subject is contained in the exception attached to the paragraph which precedes the numbered paragraphs in the application, and in paragraph 14 above quoted. After reciting that the proposed policy shall not take effect until delivered to and received by the insured during his continuance in good health, and until the first premium shall have been paid, the following exception appears: 'Except in case a conditional receipt shall have been issued as hereinafter provided.' The only provision referring to a conditional receipt is that contained in paragraph 14. Either this paragraph 14 contains the conditions under which interim insurance might be effected, or the application confers no authority whatever upon the agent to effect such interim insurance. Accepting, therefore, this paragraph 14 as containing such conditions, it is observed that (1) the first premium must have been paid in cash to the soliciting agent; (2) a conditional receipt signed by the secretary of the company and countersigned by

> the agent must have been issued; and (3) the application must have been approved. These were all conditions precedent, compliance with which was required by the company before it agreed to become a present insurer. New York Life Ins. Co. v. McCreary (C. C. A. 8), 60 F. (2d) 355, and authorities there cited."

With respect to the informal receipt, which was similar to but broader than the one here involved, the court says:

> "The applicant, however, did not receive a receipt signed by the secretary of the company and countersigned by the agent. Instead he received an informal receipt written out on the back of a blank check or promissory note, signed only by the soliciting agent. The only form of receipt which the agent, by the specific provisions of the application, was authorized to issue was one which had been signed by the secretary."

Further referring to the conditions in the application, the court says:

> "The next condition contained in the application is, 'provided this application shall be approved'. The offer of the defendant was not for present insurance, but an agreement to insure at some future time, to wit, on the approval of the application. Up to the time of the approval of the application there was no contract of insurance, and the company reserved the right to approve or reject the application. As said by us in an opinion by Judge Woodrough in Brancato v. National Reserve Life Ins. Co., 35 F. (2d) 612, 613:

'Binding receipts substantially like the one relied upon by the appellant have received frequent consideration by the courts, and it is settled that the right reserved to the insurance company to accept or reject the application for insurance referred to in the receipt is absolute. Such binding receipts leave it within the power of the company wholly to reject, without giving any reason, and the whole subject, both affirmatively and negatively, is within its choice and discretion. The matter was elaborately considered by the Supreme Court in the early case of Mutual Life Ins. Co. v. Young's Administrator, 90 U. S. (23 Wall.) 85, 106, 23 L. Ed. 152 (1874), and we can find no departure in the federal decisions from the conclusions there announced. The form of receipt under consideration in that case was not different in substance from the one involved in the present case, and the court held concerning it that—"The receipt of the 5th of June was the initial step of the parties. It reserved the absolute right to the company to accept or reject the proposition which it contained." ' "

Finally, the court holds:

"The only authority which the soliciting agent had in connection with the writing of interim insurance or issuing a conditional receipt was that contained in the application, and the terms and conditions there specified were in effect read into whatever receipt was given. The approval of the company was a prerequisite to the consummation of any contract of insurance, and the approval of the application, even though followed by the issuance of the policy after the death of the applicant, and without knowledge thereof, was certainly of

no effect. By the death of Glenn D. Braman the subject-matter of the contract of insurance ceased to exist."

"The application for insurance in the instant case, being subject to approval by the insurance company, was in effect an offer which was revoked by the death of the applicant, and his death destroyed the subject-matter of the offer."

"It follows that no contract of insurance ever became effective, and the lower court properly directed a verdict for the defendant. The judgment appealed from should, therefore, be affirmed."

The complete identity of the *Braman* case with the case now being considered is obvious. Each fact and point is thoroughly covered.

New York Life Ins. Co. v. McCreary, 60 Fed. (2d) 355, decided in the same circuit, is also identical in point of fact and law with the *Braman* and the instant case.

The California court has come to the same conclusion in the case of *Toth v. Metropolitan Life Ins. Co.,* 123 Cal. App. 185. Toth signed an application for insurance containing the usual clause to the effect:

"That no agent, medical examiner or any other person, except the officers of the company, have power on behalf of the company: (a) to make, modify or discharge any contract of insurance, (b) to bind the company by making any promises respecting any benefits under any policy issued hereunder * * *. That the company shall incur no liability under this application until it has

> been received, approved, and a policy issued and delivered and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant, * * *."

It was claimed that the company's agent collected $5.00 on account of a premium of $33.30, and that the agent stated: "You will have to pay me a deposit of $5 on the premium and I will deliver the policy and you pay me the balance of the premium. As soon as you are examined by the doctor you are protected, if you don't have the money you have 60 days to pay it to me." It having been held that the $5.00 was paid it was contended that this created an oral contract of insurance. With respect to the authority of the agent, the court said:

> "It is apparent from this evidence that neither Thomas nor any other person employed by defendant in the Bakersfield district had any authority whatever to make, on behalf of defendant, an oral agreement insuring the decedent's life. Defendant had the right to thus limit the authority of its soliciting agents and such a limitation of authority has been frequently upheld in this state. (Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 751 [13 L. R. A. (N. S.) 866, 91 Pac. 609]; 14 Cal. Jur., p. 460.) *A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the preliminary negotiations.* (14 Cal. Jur., p. 457; Browne v. Commercial Union

Assur. Co., 30 Cal. App. 547, 554 [158 Pac. 765]; Sharman v. Continental Ins. Co., 167 Cal. 117, 124 [52 L. R. A. (N. S.) 670, 138 Pac. 708].)"

The court concludes:

"The evidence in the case at bar shows without contradiction that Thomas was only a soliciting agent. He therefore had no authority to make any contract of insurance, either oral or written; and, even if we assume that he attempted to make an oral contract to insure decedent, his lack of authority so to do would prevent such purported oral contract from being valid or effective."

From the foregoing cases, particularly the *Braman* case, which concerned the same company, the same application and the same facts, it must be apparent that there could be no recovery upon any theory.

In the *Yelland* case it was contended or assumed that the application, supplemented by the alleged representations of the agent, constituted a contract. That contention this honorable court denied. In the *Toth* case it was contended that the agent had negotiated and consummated an oral contract. That contention the state court denied. In the *Braman* case, in addition to the representations, the application had, in fact, been approved, and it was asserted thereby an actual contract had been created. That was denied.

The weight and authority of these cases are sought to be overcome by the contention that they differ from this, in that in this case the applicant did not read the application. Now we answer that contention.

SECOND.

WINSLOW HAD NOTICE OF THESE LIMITATIONS BECAUSE THEY WERE CONTAINED IN THE APPLICATION. FAILURE TO READ THE APPLICATION IS NO EXCUSE. IT WAS WINSLOW'S DUTY TO READ IT.

Appellants state in their brief (p. 15):

> "The instant case is distinguishable from cases cited by insurer in its motion for directed verdict, in that in each of such cases there was no allegation or issue raised that insured had not read the application before signing it, that he had no opportunity to read it, and that he relied upon the agent to do all things necessary in so far as filling in application form and issuing proper receipt was concerned, and that it was the negligence, mistake and inadvertence of the agent that resulted in compliance, if any, with the company's rules. In the absence of such allegations and issue, it would be presumed that the applicant read the application and thus become bound thereby; but such cases are not applicable herein."

This is effectively answered in the following cases among many others:

New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934;

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185;

New York Life Ins. Co. v. McCreary, 60 Fed. (2d) 355.

Upon this point the *Fletcher* case is particularly apposite. That case involved the avoidance of a policy for misrepresentations as to the health of the appli-

cant, contained in the application. It was contended that the applicant

> "had faithfully answered all the questions, but the agents inserted in the blank false answers; that he had no reason to suppose that the answers were taken down differently from those given; *that after answering all their questions he was asked to sign his name to the paper to identify him as the party for whose benefit the policy was to be issued and for that purpose he signed the paper twice, without reading it or the written answers; that the agents did not read to him any part of the application except the questions, and did not read the clause set forth in the defendant's answer,* nor call attention to the fact that his signatures were intended as an acceptance or assent to that clause; that when the policy was delivered to him he neither read it nor the copy of the application attached to it; that the agent who delivered it informed him that it was all right, and he was insured, and he gave no further attention to the matter; that the annual premiums, as they fell due, were paid to said agent, who received them with full knowledge of all the facts; and that, therefore, the Company was estopped from pretending that any of the answers as written rendered the policy void."

And the Supreme Court answered the contention as follows:

> "But the case as presented by the record is by no means as favorable to him as we have assumed. *It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all.* It would introduce great uncer-

tainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. *But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application,* and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the Company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. *It must be presumed that he read the application, and was cognizant of the limitations therein expressed.*"

In that case, as in this, the case of *Union Insurance Co. v. Wilkinson* (80 U. S. 222; 20 L. Ed. 617; App. Br. p. 22), and others of like character, were relied upon. In that respect the Supreme Court says:

> "The present case is very different from Ins. Co. v. Wilkinson, 13 Wall. 222 [80 U. S. bk. 20, L. ed. 617], and from Ins. Co. v. Mahone, 21 Wall. 152 [88 U. S. bk. 22, L. ed. 593]. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

Here, as in the *Fletcher* case, the authority of the agent was limited in and by the application itself. That application Winslow was "presumed" to have read. This word "presumed" is used in all later cases, but is defined by the Supreme Court in the quotation on the *Fletcher* case, to the effect that "it was his duty to read the application he signed". It is in that sense that it is used in the *Toth* case, where the court says as follows:

> "Moreover, the limitation of Thomas' authority as a soliciting agent of defendant was affirmatively brought to the attention of decedent when decedent made the application for insurance, which application contained the provision that no agent or any other person except officers of defendant company has power to 'make, modify or discharge any contract of insurance' or to bind the defendant in any way 'by making any promises respecting any benefits under any policy issued hereunder'; and also the provision that defendant would incur no liability under the application until it had been received, approved and a policy issued and delivered with a full first pre-

mium paid to and accepted by defendant. *The decedent signed the application and it is presumed that he knew its contents.* (Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., 161 Cal. 466, 472 [37 L. R. A. (N. S.) 322, 119 Pac. 646].) By these provisions of the application express notice was given to decedent that the officers of the defendant reserved the exclusive right to determine whether or not defendant would insure him, and also that Thomas had no right or authority to bind defendant by any promises or purported oral agreements. (Iverson v. Metropolitan Life Ins. Co., supra.) *Thomas, therefore, had neither actual nor ostensible authority to make the purported oral contract relied upon by appellant and consequently no completed contract of insurance on the life of decedent, either oral or written, was ever entered into by decedent and defendant. An insurer is not bound by representations or purported agreements made by an unauthorized agent.* (14 Cal. Jur., p. 458; Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., supra.)"

This honorable court also, in the *Yelland* case, 41 Fed. (2d) 684, took occasion to deny the application of the *Wilkinson* case to facts similar to this case. This court there said:

"Plaintiff's main reliance is upon a group of decisions involving the effect upon an issued policy, of untrue answers to questions put to the insured in connection with his application therefor. Of these the leading case, and the one most nearly in point in her favor, is Insurance Co. v. Wilkinson, 80 U. S. (13 Wall.) 222, 225, 20 L. Ed. 617. It has often been cited, sometimes followed, and not infrequently distinguished."

The group of decisions there referred to are similar to the group of decisions cited by appellant herein. This court, after discussing the *Wilkinson* case, says:

> "It may be that if there were herein involved the effect of a false answer descriptive of the risk, New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934, could be distinguished upon the same ground upon which therein the Wilkinson case was distinguished. *But we are considering here the effect, not of a false answer made as an inducement for the execution of the contract in suit, but of an express and unambiguous provision of the writing upon which plaintiff's cause of action is predicated.*"

The foregoing, we think, on the law, disposes of the appellant's contentions.

THIRD.

THERE WAS NO INTENT OR AGREEMENT THAT THE POLICY SHOULD BE EFFECTIVE IMMEDIATELY OR UNTIL THE APPLICATION HAD BEEN ACCEPTED AND A POLICY HAD BEEN ISSUED AND DELIVERED, AND THE FULL ANNUAL PREMIUM PAID.

Prior to December 14, 1934, Moore solicited Winslow for additional insurance (he already had a policy in appellee company, Tr. 29). At the time of such solicitation Moore testified (Tr. 35):

> "Leonard asked what the quarterly rate would be, and I told him it would be $67.20, and *we figured that out that it would be higher than an annual premium. To start it, he wanted to put it on the quarterly basis. I suggested that he take it*

annually, that the first year would be the hardest, and after that he could meet, and it is in line with the policy of our company to write as much annual business as possible, which is not only advantageous to the insured, but there is less chance of lapse, and it is less expensive detail to look after."

Now, what was meant by Moore was that there is an interest charge imposed upon the premium if paid upon a quarterly basis. Murray testified (Tr. 48):

"The premium that would have been due on this particular policy and application if issued, would be $253.50 on the basis of the annual payment of premiums. On the same application and policy the amount of quarterly premium due if the policy had been issued on that basis, would be 26½ per cent of the annual premium. By taking an annual premium rather than a quarterly premium, basis of payment, the policyholder would save at least six per cent per year. The quarterly premium payment that would have become due had the policy been issued on that basis would have been $67.18."

Consequently, it was evidently decided to put the policy on an annual basis and to save this interest charge. Moore testified (Tr. 82):

"Q. Isn't it also true in this particular instance that the insured, that is, Lorenzo Winslow, offered to pay the amount that would be necessary to make the policy effective immediately on the quarterly basis, and that would have amounted to some $67?

A. Yes.

Q. And that you told him he could make a saving by paying it on an annual basis, of about 6 per cent?

A. Yes."

This decision to put the premium on an annual basis and save the 6 per cent, so arrived at, for the reasons given, was actually carried out. In other words, the final intention and agreement was to put the policy on an annual basis. Moore collected $100.00 on account of the annual premium of $253.50, and not on account of a quarterly premium and gave Winslow a receipt as follows (Exhibit 1; Tr. 89):

"253.50 Eureka, Calif. 12/14 1934

Received from Leonard N. Winslow
One Hundred Dollars

To apply on 5000.00 20 yr Endowment policy applied for in The Mutual Life Ins. Co. of New York this date. $100.00

Fred J. Moore, Agent."

Even though this receipt, admittedly, is not in the form provided in the application (App. Br. 7; Tr. 64), nevertheless, if it had been intended to represent a quarterly premium it would have so stated.

This intent and agreement is further demonstrated by Moore's letter of transmittal, after Winslow's death (Tr. 47, 48):

"On December 20th a letter was received from Fred J. Moore of Eureka, the agent in this case, as follows: 'Please send proof of death form for above party who was accidentally killed last evening as per newspaper clipping herewith. Also

the above party applied for a $5000.00 20-year endowment Dec. 14, 1934. *Applicant paid me $100.00, and had agreed to pay balance of premium within 60 days'.* That was signed 'Fred J. Moore' and the case he was referring to was the Leonard Nathan Winslow case. Later the $100 was forwarded to our company. I have not the date here that the money was received."

To make the transaction perfectly clear, Moore explained the receipt and testified as to the agreement (Tr. 40):

"Mr. Nelson. The balance on this premium as indicated on the receipt, was some $153, was it not?

A. And fifty cents.

Q. How was that to be paid?

A. Within sixty days.

Q. He agreed to do that, did he?

A. He did.

Q. Was the offer of payment made to you afterwards?

A. It was. After his death. It was.

Q. You did not accept it?

A. I did not."

It is also significant that Attorney Nelson, almost two months after the death of Winslow, tendered the balance of the premium, and upon rejection deposited it in bank. Attorney Nelson said:

"Mr. Nelson. On February 11, 1935, I offered you the $153.50 and then in view of your refusal it was deposited with the Bank of Eureka to the credit of the Mutual Life Insurance Company of New York, after the company had written its refusal to accept the money.

> Mr. Boland. I admit that the offer was made, Mr. Nelson, and I assume that the deposit was made, although we never checked on it."

It is also significant that Moore had intended, himself, to advance for Winslow and pay the balance of the premium before the 25th of December. Moore testified (Tr. 79):

> "A. Our closing date is the 25th day of the month. The application was written on the 14th, and it was my intention to have done that very thing—pay it on the 25th. That is what I would have done.
>
> Q. You were going to pay the balance of that premium to the company within the sixty days, you, yourself, personally—is that correct?
>
> A. Yes.
>
> Q. And, therefore, you were relying upon him to reimburse you for that difference?
>
> A. Yes, sir."

If it had been the intent and agreement to put the policy upon a quarterly premium basis, so that it would have gone into effect immediately, subject to the approval of the application by the appellee:

1. Why did not Moore so specify in the application in the first place?

2. Why did not Moore correct the oversight when the application was returned to him for Winslow's signature (Tr. 33)?

3. Why did Moore not so state in the receipt (Tr. 89)?

4. Why did Moore not so state in his letter of transmittal, forwarding $100.00 (Tr. 48)?

5. Why was the balance of the annual premium of $153.50 tendered to appellee by Attorney Nelson on February 11, 1935 (Tr. 41), and then deposited in bank (Tr. 43)?

6. Why should Moore have intended to pay the balance of $153.50 himself, on or about December 25, 1934 (Tr. 79)?

Obviously, because the proposition to put the policy on a quarterly premium basis was first considered and then discarded in favor of putting it on an annual basis, and abandoning any intent to have the policy become effective immediately, provided the application was approved.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
April 19, 1937.

FREDERICK L. ALLEN,
F. ELDRED BOLAND,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Appellee.

No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

H. C. NELSON,
Eureka, California
Attorney for Appellants.

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APPELLANT'S REPLY BRIEF

Cases cited by appellee do not answer appellant's contentions herein, and are to be distinguished from instant case on the facts and issues presented in pleadings.

The direct question involved in this appeal is not the authority of Moore, the agent, to write interim insurance, effective immediately, for it must be admitted that he

had such authority (Testimony of Murray, Trans. P. 53). Further the company left it to the agent to collect the premium and issue the receipt.

The general rule which imputes an agent's knowledge to the principal is well established; the underlying reason for it is that an innocent third party may properly presume the agent will perform his duty, and applies only where actual knowledge of lack of authority of the agent is wanting.

Jensen v. New York Life Ins. Co. 59 Fed. (2d) 957.

referred to in **N. Y. Life vs. McCreary,** 60 Fed. (2d) 355, 8.

The question was not considered in cases cited by appellee as to responsibility of the company for the fraud, inadvertance or neglect of the agent, in performing acts admittedly within his authority.

Herein the agent had the authority to make effective the kind of insurance the applicant asked for and which the agent admitted he told the insured he was going to get.

There was no fraud or misrepresentation on part of applicant.

The agent's fault, neglect or fraud, whatever it may be

termed, alone was responsible, under the circumstances disclosed, for the failure to have the proper form of receipt issued, and the proper blanks of the application filled in.

Authorities cited in appellant's Opening Brief, as to responsibility of the company for the acts of its agents, or the negligent failure to act, stand unanswered.

The testimony of the agent as to his method of doing business and issuing receipts, and making remittances so as to make the insurance effective immediately, stands uncontradicted.

The only penalty referred to in the Company's instructions, or manual, to agents is that if they disregard the Company's requirements the agents are subject, or liable, to dismissal. Agent Moore has continued his agency in this case to time of Trial.

Certainly, the applicant who relies upon an agent's skill and integrity in attending to the necessary details and procedure of filling in the application and issuing the necessary receipt, and who is not given an opportunity to readily acquaint himself with the peculiar limitations placed upon the agent, as to his authority, nor as to what the agent must do in the matter of issuing receipts and filing in blanks, should not be penalized for the negligence, fraud or inadvertance of the agent; nor should his beneficiaries be penalized by reason thereof.

Appellee has cited no authority wherein legal responsi-

bility of a company has been denied, where the issue and fact of fraud and neglect of agent were squarely before the Court, and the evidence without contradiction supported the same.

It is, accordingly, submitted that judgment should be reversed.

H. C. Nelson

Attorney for Appellants.

No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

PETITION FOR REHEARING

H. C. NELSON,
Eureka, California
Attorney for Appellants.

No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

PETITION FOR REHEARING

Appellant respectfully petitions the Court herein to grant a Rehearing on said appeal herein, and in support thereof, submits the following:

I. CERTAIN STATEMENTS OF MATERIAL FACTS INVOLVED, AS SET FORTH IN THE DE-

CISION ON APPEAL HEREIN, ARE ERRONEOUS, NAMELY:

1. That "no policy was issued."

It was admitted by witness Gerald W. Murray, Cashier for defendant, that the words and figures of the Home Office record on this application was as follows: "Date of Issue Dec. 21, 1934". See lower half of second page of application attached as Exhibit 2. Said witness stated with reference thereto: "I don't know whether that means whether policy was issued on that date or not".

For purposes of appellee's motion for a directed verdict every inference favorable to plaintiff must be indulged in.

2. That "Moore had no authority to make any contact for or on behalf of appellee."

Said witness Murray testified:

"Q. Do you know that your agents do tell prospective insured's that as a part of their statement to the insured that 'this policy can be made effective immediately'?

A. Yes, they can tell them that.

Q. And there are instances where the insured himself has desired that particular form of policy?

A. Yes, sir.

Q. Is that not true?

A. Yes, sir.

Q. So that you then leave it to your agent to accept the premium and issue the receipt?

A. Yes, sir." (Trans. pages 53, 54. Underscoring ours.)

Agent Moore testified that appellee had previously recognized the procedure followed in the instant case so as to make the insurance effective immediately; that it was his practice in similar cases where the insured applied for and it was agreed to have the insurance effective immediately, to issue the form of receipt that he issued in this instance; (Trans. p. 68); that he did not have the printed form of receipt referred to in paragraph 14, but the office has accepted his receipt on that order and noted in blank 14 the cash had been paid (Trans. p. 68); but the Company had accepted many receipts of the kind issued to Winslow, even though their instructions were different (Trans. p. 68-69); that it was his understanding of the attitude and policy of the company as he has conducted the business for years, that if the risk was the right kind and the medical was passed, the policy would be made effective immediately, even though the applicant died before the policy was issued (Trans. p. 70-71); that if the person paid a certain sum and agreed to pay the balance in sixty days the Company would honor that (Trans. p. 72); that the note or sixty day credit was considered cash (Trans. p. 78); that similarly had he taken a promissory note for the first premium payment it would have been effective immediately; that a note or credit of sixty days is considered cash (Trans. p. 78); that he has taken notes, or paid the premium himself that his closing date with the Company is the 25th day of the month; this application was written on the 14th and it was his intention to pay it on the 25th (Trans. p. 79). This would come under Moore's ordinary business relationship or course of busi-

ness with the Company. (Trans. p. 80). That it was his custom to make his cash settlements with the San Francisco office of the Company on the 25th of each month (Trans. p. 81), and at that time he intended to advance for the insured the balance of premium due over the $100.00 he had collected and sent in; that such basis of settlement was considered by the Company as equivalent to cash and policies had been issued on that basis (Trans. p. 80, 81, 82).

3. That "Appellee never approved Winslow's application, in his lifetime, or at all."

See testimony referred to, (Trans. pages 58-62) wherein it is admitted that the application was accepted, notations made thereon as to effective date of policy, various benefits allowed, including certain retroactive features, with the final statement by the Cashier that the Medical Department of the Home Office approved the application December 20, 1934.

II. THE DECISION OF THE COURT HEREIN MAKES NO REFERENCE TO AND APPARENTLY FAILS TO CONSIDER THE FOLLOWING MATERIAL MATTERS:

1. That direct issue was raised by appellants pleadings as to the:
   a. Negligence, inadvertance and imposition of agent with reference to filling in the application, particularly paragraph 14.
   b. The high pressure salesmanship and "rush-act" practiced by the agent upon the ap-

plicant—namely not allowing applicant to read the application and sending it to the San Francisco office without applicant's signature. (Trans. p. 45-46).

2. That notwithstanding Moore's method of transacting business for years, the appellee aproved and recognized same and never involved the threatened penalty of discharge in the event the Company rules applicable thereto were violated (Trans. p. 63 and 29).

III. THE DECISION OF THE COURT HEREIN FAILS TO DISTINGUISH THE CASES CITED THEREIN FROM THE FACTS AND ISSUES RAISED IN THE INSTANT CASE. THUS, IT IS STATED:

a. "The suggestion that Winslow did not read the application cannot be entertained. It was his duty to read it, and he is presumed to have done so. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 529."

But, in the citation quoted, at page 937, the Court states:

> "There was no evidence that the application was not read by the assured before he signed it, or that there was any imposition practiced upon him, or that after receiving the policy he applied to correct his answers, which as written down, were conceded to be false."

b. "If, despite his lack of authority, Moore attempted to make such a contract, appellee was not and is not bound thereby. Bankers Reserve Life Co. v. Yelland (CCA 9), 41 F. (2d) 684, 686; Braman v. Mutual Life Ins. Co. (CCA 8), 73 F. (2d) 391, 393; Toth v. Mutual Life Ins. Co. 123 Cal. App. 185, 192, 11 P. (2d) 94, 96."

The decisions thus cited are to be distinguished from the instant case on the facts.

(1) Thus, in Braman v. Mutual Life Ins. Co. 73 Fed. 2d 391, the Court at 397, in considering the identical form of application states:

> "This is an action at law upon this contract, and not a suit to reform the instrument, nor is there any claim of fraud or misrepresentation. In this suit the instrument must be accepted as the contract of the parties."

(2) In Toth v. Mutual Life Ins. Co. 123 Cal. App. 185, 192, 11 P. (2d) 94, 96, it was declared that "plaintiff offered no evidence what authority was vested in Thomas" (the agent).

In the instant case plaintiff made proof through Murray and Moore as to authority and practice of Moore as such agent. Furthermore, the pleadings herein directly raised the issue of imposition and negligence of the agent Moore.

(3) In Bankers Reserve Life Co. v. Yelland, 41 Fed. (2d) 684, we find the case distinguishable upon the facts and the issues raised in the pleadings. Therein there was no contention of fraud or mistake, and where it appeared that the entire contract was contained in the application, and no issue raised as to the failure to read the same, by reason of the imposition of the agent, the Court held that such application contained the entire contract.

(4) The case of Vierra v. New York Life Ins. Co. 119 C. A. 352, is directly in point as to facts and issues raised and upheld recovery against the Company.

(c) The statement in the decision herein:

"Furthermore, such a receipt, if issued, would not have made the proposed policy effective, unless the application had been, in Winslow's lifetime, approved by appellee. Braman v. Mutual Life Ins. Co., supra, p. 397."

is contrary to the meaning and purpose of immediately effective insurance and the Courts should not by decision defeat or subvert the intent and agreement of the parties.

See also testimony of Moore, Trans. pages 70-71.

There is no law preventing an insurance company making a contract with an insured that the same may be

effective immediately. The Cashier (Murray) and the agent (Moore) so testified. There is no provision in the application itself placing or justifying the limitation as to such insurance becoming effective only if approved by the company during the lifetime of the insured. When it appears from the evidence (as is the case herein) that every department of defendant including the Medical, approved the application, the Court's decision herein as to such point is entirely without support, and in fact, against the uncontradicted evidence.

In cases of applications and agreements for insurance coverage effective immediately, the death of the applicant before the policy in fact may have issued does not relieve the Company of liability.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303. 273 Pac. 1093.

Cordway v. People's Mutual Life Ins. Co., 118 Cal. App. 530, 533. 5 Pac. (2nd) 453.

Meyer v. Johnson, 7 Cal. App. 2nd, 604, 618; 46 Pac. (2nd) 822. See also note 81 A. L. R. 332 at 336.

IV. The decision of the Court herein fails to recognize or consider the law applicable to this case as declared by the United States Supreme Court in UNION MUTUAL LIFE INS. CO. v. WILKINSON, 13 Wall. 222, 20 L. Ed. 617; relating to the negligence, mistake and fraud of agents, and in decisions cited in appellant's Brief approving same.

CONCLUSION.

To sum up:

We have a case (1) where the Jury rendered a verdict not as its own verdict, but simply because it was so instructed (Trans. 87); and (2) where this Court has apparently arrived at erroneous conclusions as to most important and material facts as hereinbefore noted, and has apparently failed to consider other material facts and issues material to a just and proper decision herein. The cases cited in support of its decision are distinguishable on the facts from the instant case. The decision rendered is not supported by the law cited therein; and the result shocks the senses as to what is administration of justice and fair dealing. In fact the greatest injustice is done and a premium is placed upon the inadvertance, admitted negligence, mistake or fraud of the insurance company's representatives. Where the agent has authority to enter into the contract agreed upon, any failure on his part to pursue the method prescribed should rest upon the insurer rather than the insured.

At the time calendared for argument, request was made for continuance and opportunity for oral argument because of illness of appellant's counsel, and it is urged that further opportunity for oral argument and full consideration of the case in view of the foregoing points, will compel a reversal.

Respectfully submitted,

N. C. Nelson

Attorney for Appellants.

CERTIFICATE OF COUNSEL.

I, H. C. Nelson, hereby certify that I have been counsel for Appellants at the times during the pendency of the within litigation since the filing of the original complaint therein to date; that in my judgment the Petiton for Rehearing herein is well founded and that it is not interposed for delay.

H. C. Nelson

Attorney for Appellants.

No. 8476

15

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ALMA I. WAGNER, Executrix of the Estate of Robert G. Wagner, Deceased; UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellees.

TRANSCRIPT OF RECORD

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1377

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

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Appellees.

TRANSCRIPT OF RECORD

INDEX

(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.)

NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney

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Los Angeles, California

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CLAUDE I. PARKER
Bank of America Building
Los Angeles, California

For Appellee United States Fidelity, etc.:

MILLS, HUNTER & DUNN
Chapman Building
Los Angeles, California

UNITED STATES OF AMERICA, ss.

To Alma I. Wagner and to Claude I. Parker her attorney:

To United States Fidelity & Guaranty Company, a Corp., and Mills, Hunter & Dunn, its attorneys: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of January, A.D. 1937, pursuant to a petition for appeal and order allowing the same filed December 30, 1936, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled United States of America v. Alma I. Wagner, Executrix of the Est. of Robert G. Wagner, Dec., and United States Fidelity and Guaranty Company, a Corp., No. 7125-M, wherein United States is plaintiff-appellant and you are defendants-appellees to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 30th day of December, A.D. 1936, and of the Independence of the United States, the one hundred and sixty-first.

Paul J. McCormick
U. S. District Judge for the Southern District of California.

(Endorsed): Service of a copy of the above citation together with a copy of the petition for appeal, order allowing appeal, and assignment of errors is hereby acknowledged this 31 day of December, 1936. Claude I. Parker. By J. Everett Blum, Attorneys for Alma I. Wagner. Mills, Hunter & Dunn, By Edward C. Mills, Attorneys for U. S. Fidelity & Guaranty Co. Filed Dec. 31-1936. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALMA I. WAGNER, Executrix of the Estate of ROBERT G. WAGNER, Deceased,

and

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Defendants.

At Law No. 7125-M

COMPLAINT

FOR RECOVERY ON BOND FOR INCOME TAX

The United States by its attorney, Peirson M. Hall, United States Attorney for the Southern District of California, complains of the defendants in an action at law alleging for a cause of action as follows:

I.

That the plaintiff was at all times hereinafter mentioned and is now a corporation sovereign and body politic.

II.

That the defendant, Alma I. Wagner, is a citizen of the State of California and resides at 830 South Olive Street, Los Angeles, in the State and Southern judicial district of California, within the jurisdiction of this Court.

III.

That the defendant, the United States Fidelity & Guaranty Company, is a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to engage in business in the State of California; that said defendant has an office and place of business at which it may be served with process herein at 724 South Spring Street, City of Los Angeles, Los Angeles County, State of California, within the jurisdiction of this Court.

IV.

That this is a suit at law of civil nature founded upon contract and growing out of the laws of the United States providing for internal revenue and is authorized and sanctioned by the Attorney General of the United States at the request of the United States Commissioner of Internal Revenue.

V.

That on to-wit, March 15, 1921, Robert G. Wagner a resident of Los Angeles, State of California, filed in

the office of the Collector of Internal Revenue, an income tax return for the calendar year 1920.

VI.

That waivers were duly executed by the said Robert G. Wagner, which waived the requirements of the several revenue acts and extended the time within which assessment of additional income tax for 1920 might be made, until December 31, 1927, with the exception that if a notice of a deficiency in tax should be sent to said taxpayer by registered mail before December 31, 1927, and an appeal should be filed therefrom with the United States Board of Tax Appeals, then the date for assessment should be further extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by the said United States Board of Tax Appeals.

VII.

That on, to-wit, May 25, 1927, the said Robert G. Wagner died testate being at the time of his death a resident of the City and County of Los Angeles, California; that on, to-wit, June 15, 1927, the Superior Court of the State of California in and for the County of Los Angeles, granted letters testamentary to Alma I. Wagner, the defendant herein.

VIII.

That on, to-wit, October 19, 1927, notice of a deficiency of tax for 1920 in the amount of $13,380.44 was sent by registered mail addressed to Mrs. Alma I. Wagner, Executrix, Mr. Robert G. Wagner, Deceased, 830 South Olive Street, Los Angeles, California, said notice

inviting the defendant's attention to her right to file a petition within sixty days with the United States Board of Tax Appeals for a redetermination of the deficiency.

IX.

That the said Alma I. Wagner, duly filed a petition with the United States Board of Tax Appeals, said cause being assigned Docket No. 32981 and being entitled Alma I. Wagner, Executrix, Estate of Robert G. Wagner, Deceased, petitioner, v. Commissioner of Internal Revenue, respondent, for a redetermination of the tax for 1920.

X.

That on, to-wit, June 29, 1931, the said United States Board of Tax Appeals entered its decision that there was a deficiency of $13,380.44 for 1920.

XI.

That on, to-wit, October 24, 1931, in accordance with the provisions of section 1001 of the Revenue Act of 1926 as amended by section 603 of the Revenue Act of 1928 relating to the filing of petitions for the review of decisions of the United States Board of Tax Appeals by the United States Circuit Court of Appeals, the defendants herein, Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, as principal, and the United States Fidelity & Guaranty Company, as surety, made and executed their certain writing obligatory, otherwise called bond, now the Court shown, duly executed by them on that date with the name of Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, thereto signed and the name of the United

States Fidelity & Guaranty Company thereto signed by H. V. D. Johns, Attorney in fact, and its corporate seal thereto affixed, whereby they acknowledged themselves to be held and firmly bound to the United States of America in the sum of $26,760.88 for the payment whereof they firmly bound themselves, and each of them, their successors and assigns, jointly and severally; that on, to-wit, December 15, 1931, the said bond was approved by Stephen J. McMahon, member of the United States Board of Tax Appeals, whose signature appears thereon; that said bond so made, executed and approved was duly delivered to the plaintiff, the United States of America; that copy of said bond is hereto attached and made a part hereof, the same as if fully written herein, and marked "Exhibit A" for convenience of reference and identification.

XII.

Said bond had, and has, a condition therein written in words and symbols as follows:

> NOW, THEREFORE, the condition of this obligation is such, that if the above named ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, shall file her petition for review and shall prosecute said petition for review to effect and shall pay the deficiency as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

XIII.

That induced by said bond and in reliance thereon, plaintiff refrained from collection of said income tax and interest thereon, pending the decision of the United States Circuit Court of Appeals for the Ninth Circuit with reference to the petition for review.

XIV.

That the said Alma I. Wagner, duly filed a petition for review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit, which said Court, on, to-wit, March 13, 1933, by its judgment affirmed the decision of the United States Board of Tax Appeals.

XV.

That on, to-wit, June 15, 1933, the time in which the said Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, might file a petition for writ of certiorari from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, expired and no petition for a writ of certiorari was or has been filed.

XVI.

That the deficiency of tax for 1920 in the amount of $13,380.44 together with interest thereon to August 26, 1933, in the sum of $6,021.20, was duly assessed by the Commissioner of Internal Revenue on the August 1933 List for the Sixth District of California.

XVII.

That on, to-wit, September 1, 1933, plaintiff, through its Collector of Internal Revenue, made demand for pay-

ment of $19,401.64, tax and interest, on the defendant, the said Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased; that on, to-wit, February 28, 1934, the plaintiff, through its Collector of Internal Revenue, made demand for payment of the said tax together with interest thereon, upon defendant, the said United States Fidelity & Guaranty Company, but notwithstanding such demands, the payment of said tax and/or interest thereon has not been made, nor any part thereof; the said defendants herein having wholly neglected, failed and refused to pay the same or any part thereof; and still so neglect and refuse to pay.

XVIII.

By reason of the premises, plaintiff avers that it has done and performed all the matters and things by it to be done and performed in accordance with the terms and stipulations of the bond; that the defendants, Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, and the United States Fidelity & Guaranty Company, have failed, neglected, and refused to do and perform the things therein required of them to be done and performed, and have breached the said bond, whereby the promise thereof has become and now is absolute, and there has accrued to plaintiff the right to demand and have of them on account thereof, Nineteen thousand, four hundred and one and 64/100ths ($19,401.64) Dollars with interest on Thirteen thousand three hundred and eighty and 44/100ths ($13,380.44) Dollars from August 26, 1933 to September 1, 1933 at the rate of six per cent per annum, and from September 1, 1933 at the

rate of one per cent per month, which they promised to pay but which they have already failed and neglected and refused to pay although such payment has been demanded of them by plaintiff.

XIX.

WHEREFORE, plaintiff prays that it may have judgment jointly and severally against the defendants for Nineteen thousand four hundred and one and 64/100ths ($19,401.64) Dollars, with interest on Thirteen thousand Three Hundred and Eighty and 44/100ths ($13,380.44) Dollars, from August 26, 1933 to September 1, 1933 at six per cent and from September 1, 1933 at one per cent per month, and the plaintiff's costs herein expended.

PEIRSON M. HALL,
United States Attorney.

ROBERT WINFIELD DANIELS,
Asst. United States Attorney,
Attorneys for Plaintiff.

EXHIBIT "A"

UNITED STATES
FIDELITY and GUARANTY COMPANY
No..... BALTIMORE, MARYLAND. $26,760.88

UNITED STATES BOARD OF TAX APPEALS
WASHINGTON, D.C.

ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

Docket No. 32981

BOND

KNOW ALL MEN BY THESE PRESENTS, that we, ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, as Principal and the UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as Surety, are held and firmly bound unto the above named COMMISSIONER OF INTERNAL REVENUE and/or the UNITED STATES OF AMERICA, in the sum of Twenty-six Thousand Seven Hundred Sixty and 88/100 Dollars ($26,760.88) (double the deficiency), to be paid to the said COMMISSIONER OF INTERNAL REVENUE and/or the UNITED STATES OF AMERICA; for the payment of which well and truly to be made we bind ourselves and each of us and our successors and assigns, jointly and severally, firmly by these pres-

ents. Sealed with our seals and dated the 24th day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-One.

WHEREAS, the above named ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, is filing or is about to file with the U. S. Board of Tax Appeals, a petition for review of the Board Decision by the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the final order of redetermination rendered in the above entitled cause.

NOW, THEREFORE, the condition of this obligation is such, that if the above named ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, shall file her petition for review and shall prosecute said petition for review to effect and shall pay the deficiency as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ALMA I. WAGNER
Executrix of the Estate of
Robert G. Wagner, Deceased.

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By H. V. D. JOHNS
Attorney-in-Fact.

APPROVED BY Stephen J. McMahon
Member United States Board of
Tax Appeals. SEAL
Date Dec. 15th, 1931.
T202755
Los Angeles 45 G-26-31 5M

STATE OF CALIFORNIA,
County of Los Angeles—ss.

On this 24th day of October in the year one thousand nine hundred and Thirty-One, before me, Agnes L. Whyte, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared H. V. D. Johns, known to me to be the duly authorized Attorney-in-fact of the UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said H. V. D. Johns duly acknowledged to me that he subscribed the name of the UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

AGNES L. WHYTE
Notary Public in and for Los Angeles
County, State of California
My Commission Expires February 26, 1933

TREASURY DEPARTMENT
Office of The Secretary

COMMISSIONER OF ACCOUNTS AND DEPOSITS
Section of Surety Bonds
Examined and approved as to
the within corporate surety.

D. W. BELL DEC 15 1931
Commissioner of Accounts and Deposits

(Endorsed): Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, Appellant, vs. Commissioner of Internal Revenue, Appellee. United States Fidelity and Guaranty Company, Baltimore Maryland. Filed Mar. 25, 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy.

[Title of Court and Cause]

At Law No. 7125-M

ANSWER

Comes now the defendant Alma I. Wagner, and answers the complaint herein as follows:

I.

Admits the allegations contained in Paragraph I of said complaint.

II.

Admits the allegations contained in Paragraph II of said complaint.

III.

Admits the allegations contained in Paragraph III of said complaint.

IV.

Defendant alleges that she has no information or belief upon the matters alleged in Paragraph IV of the complaint sufficient to enable her to answer the same, and basing her denial on that ground she denies that this suit is authorized and sanctioned by the Attorney General of the United States at the request of the United States Commissioner of Internal Revenue.

V.

Admits the allegations contained in Paragraph V of said complaint.

VI.

Admits the allegations contained in Paragraph VI of said complaint.

VII.

Admits the allegations contained in Paragraph VII of said complaint.

VIII.

Admits the allegations contained in Paragraph VIII of said complaint.

IX.

Admits the allegations contained in Paragraph IX of said complaint.

X.

Admits the allegations contained in Paragraph X of said complaint.

XI.

Answering Paragraph XI of said complaint, defendant admits that on December 15, 1931 she executed as principal, and the defendant United States Fidelity and Guaranty Company executed as surety, a certain written instrument purporting to be a bond and that Exhibit A of plaintiff's complaint is a copy of said written instrument. Defendant admits that said purported bond was approved by Stephen J. McMahon, member of the United States Board of Tax Appeals, and was delivered to plaintiff. Defendant denies all the allegations of said paragraph not herein expressly admitted. Defendant denies that said purported bond was duly executed and denies

that said bond was executed in accordance with the provisions of Section 1001 of the Revenue Act of 1926 as amended by Section 603 of the Revenue Act of 1928 or in accordance with the provisions of any other statute of the United States relating to the filing of petitions for the review of decisions of the United States Board of Tax Appeals by the United States Circuit Court. Defendant further alleges that on April 7, 1931, she was discharged as Executrix of the Estate of Robert G. Wagner, deceased, and that on December 15, 1931 she had no authority whatever to act for or on behalf of or to represent in any manner the Estate of Robert G. Wagner, deceased.

XII.

Admits the allegations contained in Paragraph XII of said complaint.

XIII.

The defendant alleges that she has no information or belief upon the matters alleged in Paragraph XIII of the complaint herein sufficient to enable her to answer the same, and basing her denial on that ground she denies that, induced by said bond and in reliance thereon, plaintiff refrained from collection of said income tax and interest thereon pending the decision of the United States Circuit Court of Appeals for the Ninth Circuit with reference to the petition for review.

XIV.

Defendant admits that she filed a petition for review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit and that on March 13, 1933 the Cir-

cuit Court of Appeals for the Ninth Circuit, by its judgment, affirmed the decision of the United States Board of Tax Appeals. Defendant denies that said petition for review was duly filed and alleges that at the time said petition was filed, defendant was not executrix of the estate of Robert G. Wagner, deceased, and had no authority to represent said estate or to prosecute any actions or appeals for or on behalf of said estate.

XV.

Defendant denies generally and specifically each and every allegation contained in Paragraph XV of said complaint and alleges that the time for filing a petition for a writ of certiorari from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit expired on June 12, 1933.

XVI.

Defendant denies generally and specifically each and every allegation contained in Paragraph XVI of said complaint and alleges that the deficiency of tax for 1920 in the amount of $13,384.44, together with interest thereon to August 26, 1933 in the sum of $6,021.20, was assessed by the Commissioner of Internal Revenue on August 26, 1933. Defendant denies that said assessment was duly made and alleges that under Sections 277 and 278 of the Revenue Act of 1926 the time for assessment of said deficiency expired on August 11, 1933 and alleges that at the time the assessment of said deficiency was made, to-wit, on the 26th day of August, 1933, that said assessment was barred by the Statute of Limitations, as provided in Sections 277 and 278 of the Revenue Act of 1926.

XVII.

Defendant admits the allegations contained in Paragraph XVII of the said complaint.

XVIII.

Defendant denies generally and specifically each and every allegation contained in Paragraph XVIII of the said complaint, save and except defendant admits that demand for payment has been made by plaintiff, and that defendants, and each of them, have failed, refused and neglected to make payment.

WHEREFORE, defendant prays for judgment in her favor, for costs and for such other relief as may be just and proper in the premises.

CLAUDE I. PARKER
JOHN B. MILLIKEN
GEORGE H. KOSTER
Attorneys for Defendant
Alma I. Wagner.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

ALMA I. WAGNER, being first duly sworn, deposes and says:

That she is one of the defendants in the above entitled action; that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

ALMA I. WAGNER.

Subscribed and sworn to before me this 27th day of August, 1935.

(SEAL) MARGUERITE LESAGE
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed): Filed Aug. 29, 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy.

[TITLE OF COURT AND CAUSE]

At Law No. 7125-M

ANSWER OF UNITED STATES FIDELITY & GUARANTY COMPANY

Comes now the defendant, United States Fidelity & Guaranty Company, a corporation, for itself alone and not otherwise, and answering the complaint of plaintiff herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I of said complaint.

II.

Admits the allegations contained in Paragraph II of said complaint.

III.

Admits the allegations contained in Paragraph III of said complaint.

IV.

Defendant alleges that it has no information or belief upon the matters alleged in Paragraph IV of the com-

plaint sufficient to enable it to answer the same and basing its denial on that ground denies that this suit is authorized or sanctioned by the Attorney General of the United States at the request of the United States Commissioner of Internal Revenue.

V.

Admits the allegations contained in Paragraph V of said complaint.

VI.

Admits the allegations contained in Paragraph VI of said complaint.

VII.

Admits the allegations contained in Paragraph VII of said complaint.

VIII.

Admits the allegations contained in Paragraph VIII of said complaint.

IX.

Admits the allegations contained in Paragraph IX of said complaint.

X.

Admits the allegations contained in Paragraph X of said complaint.

XI.

Answering Paragraph XI of said compliant, defendant admits that on December 15, 1931, defendant Alma I. Wagner executed, as principal, and the defendant, United States Fidelity & Guaranty Company, executed as surety, a certain written instrument purporting to be a bond and that Exhibit A of plaintiff's complaint is a copy of said written instrument. Defendant admits that said pur-

ported bond was approved by Stephen J. McMahorn, member of the United States Board of Tax Appeals, and was delivered to plaintiff. Defendant denies all the allegations of said paragraph not herein expressly admitted. Defendant denies that said purported bond was duly executed and denies that said bond was executed in accordance with the provisions of Section 1001 of the Revenue Act of 1926 as amended by Section 603 of the Revenue Act of 1928 or in accordance with the provisions of any other statute of the United States relating to the filing of petitions for the review of decisions of the United States Board of Tax Appeals by the United States Circuit Court of Appeals. Defendant further alleges that on April 7, 1931, defendant Alma I. Wagner, was duly discharged as the executrix of the estate of Robert G. Wagner, deceased, and that on December 15, 1931, she had no authority whatever to act for or on behalf of or to represent in any manner the estate of Robert G. Wagner, deceased.

XII.

Admits the allegations contained in Paragraph XII of said complaint.

XIII.

The defendant alleges that it has no information or belief upon the matters alleged in Paragraph XIII of the complaint herein sufficient to enable it to answer the same and basing its denial upon that ground denies that induced by said bond or in reliance thereon, plaintiff refrained from collection of said income tax and interest thereon pending the decision of the United States Cir-

cuit Court of Appeals for the Ninth Circuit with reference to the petition for review.

XIV.

Answering Paragraph XIV of the complaint, defendant admits that defendant, Alma I. Wagner, filed a petition for review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit and that on March 13, 1933, the Circuit Court of Appeals for the Ninth Circuit, by its judgment, affirmed the decision of the United States Board of Tax Appeals. Defendant denies that said petition for review was duly filed and alleges that at the time said petition was filed, defendant, Alma I. Wagner, was not executrix of the estate of Robert G. Wagner, deceased, and had no authority to represent said estate or to prosecute any actions or appeals for or on behalf of said estate.

XV.

Defendant denies generally and specifically each and every allegation contained in Paragraph XV of said complaint and alleges that the time for filing a petition for a writ of certiorari from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit expired on June 12, 1933.

XVI.

Defendant denies generally and specifically each and every allegation contained in Paragraph XVI of said complaint and alleges that the deficiency of tax for 1920 in the amount of $13,384.44, together with interest thereon to August 26, 1933, in the sum of $6,021.20, was

assessed by the Commissioner of Internal Revenue on August 26, 1933, and not heretofore. Defendant denies that said assessment was duly made and alleges that under Sections 277 and 278 of the Revenue Act of 1926 the time for assessment of said deficiency expired on August 11, 1933, and alleges that at the time the assessment of said deficiency was made, to-wit, on the 26th day of August, 1933, that said assessment was barred by the statute of limitations, as provided in Sections 277 and 278 of the Revenue Act of 1926.

XVII.

Defendant admits the allegations contained in Paragraph XVII of the said complaint.

XVIII.

Defendant denies generally and specifically each and every allegation contained in Paragraph XVIII of the said complaint, save and except defendant admits that demand for payment has been made by plaintiff, and that defendants, and each of them, have failed, refused and neglected to make payment.

WHEREFORE, defendant prays for judgment in its favor, for costs, and for such other relief as may be just and proper in the premises.

MILLS, HUNTER & DUNN
By EDWARD C. MILLS
Attorneys for defendant, United States Fidelity & Guaranty Company, a corporation.

STATE OF CALIFORNIA
County of Los Angeles—ss.

J. T. Quail being by me first duly sworn, deposes and says: that he is the Superintendent of Claims for United States Fidelity & Guaranty Company, one of the defendants in the within action; that this verification is made by the affiant for the reason that said company is a corporation; that none of the officers are within the County of Los Angeles, and that affiant is an employee of said Corporation who has investigated and has knowledge of the facts alleged in the answer in the above entitled action; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

J. T. QUAIL.

Subscribed and Sworn to before me this 20th day of Aug., 1935.

(SEAL) ALICE JEAN BROOKMEYER
Notary Public in and for the County of Los Angeles.

(Endorsed): Filed Aug. 29, 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The September Term, A.D. 1936, of the District Court of the United States of America, within and for the Central Division of the

Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 25th day of September, in the year of our Lord one thousand nine hundred and thirty-six.

Present:
The Honorable PAUL J. McCORMICK, District Judge.

United States of America, Plaintiff,

vs.

Alma I. Wagner, Executrix of the Estate of of Robert G. Wagner, deceased, and United States Fidelity & Guaranty Co., a Corp., Defendant.

No. 7125-M
Law

This cause coming before the court for trial; Alva C. Baird, Assistant U. S. Attorney, appearing for the government; and J. Everett Blum, Esq., appearing as counsel for defendant Alma I. Wagner, etc.; Attorney Mills appearing as counsel for U. S. Fidelity & Guarant*ee* Co.; A. Wahlberg being present as official court reporter;

At 10:02 o'clock a.m. counsel answer ready, and it is ordered to proceed;

J. E. Blum, Esq., confesses judgment against defendant Alma I. Wagner, etc.;

Attorney Mills joins in the confession of judgment;

It is ordered that cross-complaint of U. S. Fidelity & Guaranty Corp. against Alma I. Wagner may be filed;

J. E. Blum, Esq., confesses judgment on said cross-complaint, and it is stipulated between the defendants

that $500.00 be allowed to the U. S. Fidelity & Guaranty Corp. as attorney's fee;

Alva C. Baird, Esq., moves for allowance of interest as prayed, with a certain modification;

J. E. Blum, Esq., makes reply thereto;

It is ordered said motion be denied; exception noted favor of the government;

It is ordered that interest of 6% from August 26, 1933 to September 1, 1933 and 7% from September 1, 1933 to August 30, 1935 and 6% from August 30, 1935 until paid, be allowed.

It is stipulated and ordered that defendant Alma I. Wagner may have fifteen days stay of execution on judgments. Counsel to prepare judgment herein.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION,

Defendants.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION,

Defendant and Cross-Complainant,

v.

ALMA I. WAGNER,

Defendant and Cross-Defendant.

At Law No. 7125-M

JUDGMENT

The above-entitled cause came on regularly for trial on the 25th day of September, 1936, before the Court sitting without a jury, a jury having been expressly waived in writing, the plaintiff appearing by its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell, Special Assistant United States Attorney, and Alva C. Baird, Assistant United States Attorney; the defendant and cross-defendant Alma I. Wagner, Executrix of the Estate of Robert C. Wagner, deceased, appearing by Claude I. Parker and

J. Everett Blum, her attorneys, and the defendant and cross-complainant United States Fidelity and Guaranty Company, a corporation, appearing by its attorneys, Mills, Hunter & Dunn, by Edward C. Mills, and attorneys for both defendants having in open Court confessed judgment in the principal amount sued for, and having submitted for decision the question of the proper rate of interest to be computed thereon, and the Court having been fully advised in the premises, finds generally, both upon the facts and the law, in favor of the plaintiff and against the defendants, and in favor of cross-complainant and against cross-defendant.

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered against the defendants jointly and severally in favor of the plaintiff United States of America in the sum of $19,401.64, together with interest on $13,380.44 thereof as follows:

From August 26, 1933 to September 1, 1933, at 6%	$ 13.38
From September 1, 1933, to August 30, 1935, at 7%	1,873.20
From August 30, 1935 to October 1, 1936, at 6%	869.70

Principal, $19,401.64; Interest $2,756.28; total judgment, $22,157.92.

IT IS FURTHER ORDERED that the plaintiff recover from said defendants its costs herein expended. Costs taxed at $20.28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that cross-complainant United States Fidelity and Guaranty

Company, a corporation, do have and recover of and from cross-defendant Alma I. Wagner the sum of $22,-157.92 together with the costs of said cross-complainant herein incurred and the additional sum of $500.00 as attorney's fees.

It Is Further Ordered, Adjudged and Decreed that the Judgment herein in favor of cross-complainant and against cross-defendant shall be without prejudice to the rights of cross-complainant and cross-defendant under any contract or agreement existing between them in connection with the deposit or pledge with or holding by said cross-complainant, United States Fidelity and Guaranty Company, a corporation, of any property as collateral security to the obligation of said cross-defendant, Alma I. Wagner, to said United States Fidelity and Guaranty Company, a corporation, by reason of the execution of the bond herein sued upon and the right of said cross-complainant, United States Fidelity and Guaranty Company, a corporation, to have execution herein and its rights under such collateral agreements shall be cumulative and without prejudice, one to the other.

It Is Further Ordered, Adjudged and Decreed that any sum paid by said cross-defendant, Alma I. Wagner, to plaintiff, United States of America, on account of its Judgment herein against defendants or paid by said United States Fidelity and Guaranty Company, a corporation, on account of said Judgment out of the proceeds of collateral held by it, shall to the extent of such payments be credited upon and in satisfaction pro tanto of the Judgment herein rendered in favor of said cross-complainant, United States Fidelity and Guaranty Com-

pany, a corporation, and against said Alma I. Wagner, cross-defendant herein.

It Is Further Ordered, Adjudged and Decreed that execution on the Judgment in favor of the United States of America and in favor of cross-complainant, United States Fidelity and Guaranty Company, a corporation, be stayed for the period of fifteen (15) days from the date of entry hereof.

It Is Further Ordered, Adjudged and Decreed that the attorneys' fees herein adjudged to be paid by cross-defendant to cross-complainant are in full for all services of attorneys heretofore rendered or hereafter to be rendered, except such services as may be rendered in connection with any appeal taken from this Judgment.

Dated: This 1st day of October, 1936.

Paul J. McCormick
United States District Judge.

Approved as to form
as provided by Rule 44:

Claude I. Parker
J. Everett Blum
Attorneys for defendant and cross-defendant, Alma I. Wagner.

Mills, Hunter & Dunn
by Edward C. Mills
Attorneys for defendant and cross-complainant, United States Fidelity and Guaranty Company, a corporation.

Peirson M. Hall—by Alva C. Baird
Attorneys for plaintiff, United States of America.

Judgment entered and recorded Oct. 1-1936. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Written in pen and ink in margin): Filed 1/5/37 Satis. of Judg. in amt $22,212.43 as to deft. Wagner. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy.

(Endorsed): Filed Oct. 1-1936. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. Judgment entered & recorded Oct. 1, 1936. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALMA I. WAGNER, Executrix of the Estate of ROBERT G. WAGNER, deceased, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Defendants.

No. 7125-M

PETITION FOR APPEAL FROM JUDGMENT ENTERED OCTOBER 1, 1936.

TO THE ABOVE-ENTITLED COURT AND TO HONORABLE PAUL J. MCCORMICK, Judge thereof:

Your Petitioner, the Plaintiff in the above-entitled case, feeling aggrieved by the judgment as entered herein in

favor of said plaintiff on October 1, 1936, prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rule of such Court in such cases made and provided, and in connection with this Petition Petitioner hereby presents Assignment of Errors dated December 28, 1936.

PEIRSON M. HALL,
Peirson M. Hall,
United States Attorney.

E. H. MITCHELL,
E. H. Mitchell,
Asst. U. S. Attorney.

ALVA C. BAIRD,
Alva C. Baird,
Asst. U. S. Attorney.

(Endorsed): Filed Dec. 30, 1936. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 7125-M

ASSIGNMENT OF ERRORS

The Plaintiff makes and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal from the judgment of this Court on the first day of October, 1936:

I.

The Court erred in fixing the amount of the judgment against the defendants and in favor of the Plaintiff in a sum which included interest on the amount of $13,380.44 at the rate of 7% per annum from September 1, 1933 to August 30, 1935, and not at the rate of 12% per annum for said period of time as provided by Section 274 (k) of the Revenue Act of 1926.

II.

The Court erred in failing to render judgment against the defendants and in favor of the Plaintiff for an amount sufficient to include interest on the sum of $13,-380.44 at the statutory rate of 12% per annum from September 1, 1933 to August 30, 1935.

Dated December 28, 1936.

PEIRSON M. HALL,
Peirson M. Hall,
United States Attorney.

E. H. MITCHELL,
E. H. Mitchell,
Special Assistant U. S. Attorney.

ALVA C. BAIRD,
Alva C. Baird,
Assistant United States Attorney.

(Endorsed): Filed Dec. 30, 1936. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALMA I. WAGNER, Executrix of the Estate of ROBERT G. WAGNER, deceased, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Defendants.

No. 7125-M

ORDER ALLOWING APPEAL

The Plaintiff herein, United States of America, having filed its petition for appeal from the judgment entered herein, together with its assignment of errors herein,

IT IS HEREBY ORDERED that the appeal prayed for in said petition of Plaintiff in the above-entitled cause is allowed.

Dated: December 30th, 1936.

PAUL J. McCORMICK
Paul J. McCormick

(Endorsed): Filed Dec. 30, 1936. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 7125-M

PRAECIPE

To: R. S. Zimmerman, Clerk of the United States District Court, Southern District of California:

YOU ARE HEREBY REQUESTED to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an Appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. ~~Stipulation Waiving Jury.~~
5. Minute Order of September 25, 1936.
6. Judgment.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal.
10. Clerk's Certificate and this Praecipe.

Dated February 17, 1937.

PEIRSON M. HALL,
Peirson M. Hall,
United States Attorney.

E. H. MITCHELL,
E. H. Mitchell,
Special Assistant U. S. Attorney.

ALVA C. BAIRD,
Alva C. Baird,
Assistant United States Attorney.

(Endorsed): Filed Feb. 18, 1937. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, Clerk of the United States District Court, for the Southern District of California, do hereby certify the foregoing Transcript containing 35 pages numbered from 1 to 35, inclusive, to be the Transcript of Record on Appeal in the within entitled action, as printed by the Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me, and contains full, true and correct copies of original documents in said action, as follows:

Citation,
Complaint,
Answer,
Minute Order of September 25, 1936,
Judgment,
Petition for Appeal,
Assignment of Errors,
Order Allowing Appeal, and
Praecipe.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States, in and for the Southern District of California, this ..... day of February, in the year of our Lord One Thousand Nine Hundred Thirty-seven, and of our Independence the One Hundred and Sixty-first.

(SEAL) R. S. ZIMMERMAN, Clerk,

By.....
Deputy Clerk.

No. 8476

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
PAUL R. RUSSELL,
J. LEONARD LYONS,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
ALVA C. BAIRD,
Assistant United States Attorney.
Attorneys for Appellant

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 137.

INDEX

ARGUMENT

CITATIONS

CASES:

STATUTES: PAGE

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Appellees.

BRIEF FOR THE UNITED STATES

Opinion Below

The opinion of the District Court (R. 25-26) is unreported.

Jurisdiction

This appeal involves additional interest of approximately $1,338.04 on a bond given to guarantee payment of income tax for 1920, representing a liability of the estate of Robert G. Wagner, and is taken from a judgment of the District Court entered October 1, 1936. (R. 27-31.) The case is brought to this Court by petition

for appeal filed December 30, 1936 (R. 31-32), together with assignment of errors (R. 32-33), which were allowed on the same date (R. 34). The jurisdiction of this Court is invoked by the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925. The jurisdiction of the trial court arises by reason of the fact that plaintiff's suit is an action at law of civil nature, founded upon contract and growing out of the laws of the United States providing for internal revenue, as stated in the bill of complaint, Paragraph IV. (R. 4.)

Question Presented

Whether a surety on an appeal bond executed pursuant to Section 603 of the *Revenue Act of 1928* is liable for interest at the rate prescribed by the Federal statute or at the rate prevailing in the state.

Statutes and Regulations Involved

These will be found in the Appendix, *infra,* pp. 17-23.

Statement

This is a suit to collect on a bond given by appellees, Alma I. Wagner, executrix of the estate of Robert G. Wagner, her deceased husband, as principal, and the United States Fidelity and Guaranty Company as surety, to secure the payment of income tax due from the decedent for 1920. (R. 3-10.) The facts are not in dispute.

On October 19, 1927, the Commissioner of Internal Revenue duly notified Alma I. Wagner, as executrix of

her husband's estate, of a deficiency of income tax relating to decedent's income for 1920. (R. 5.) A petition was thereupon filed with the United States Board of Tax Appeals, contesting the Commissioner's determination of deficiency. (R. 6.) The Board entered its decision on June 29, 1931, affirming the Commissioner's determination. (R. 6.)

On October 24, 1931, the bond upon which this proceeding is based was executed by appellees (R. 6-7), and thereafter, on December 15, 1931, same was approved by a member of the United States Board of Tax Appeals (R. 7). Appellee Alma I. Wagner thereupon prosecuted her petition for review of the decision of the United States Board of Tax Appeals before the United States Circuit Court of Appeals for the Ninth Circuit. On March 13, 1933, the Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals. (R. 8.) No petition for writ of certiorari was filed. (R. 8.)

The Commissioner assessed the deficiency as determined by the Board and affirmed by the Circuit Court of Appeals, in August, 1933, in the amount of $13,380.44, plus interest in the sum of $6,021.20. (R. 8.) The United States Collector of Internal Revenue made demand on Alma I. Wagner for payment of the deficiency and interest on September 1, 1933 (R. 8-9), and made further demand on the United States Fidelity and Guaranty Company on February 28, 1934, for the tax and interest (R. 9). Upon failure of either of the appellees to pay the tax or interest or any part thereof, the bill of complaint herein was filed on March 25, 1935 (R. 14),

to recover the sum due and owing in accordance with the obligation of the bond. The bill claimed interest at the rate of 1% per month from the date of notice and demand for payment of the deficiency, September 1, 1933, on the principal amount of the tax exclusive of accrued interest. (R. 9-10.) Judgment was entered on October 1, 1936, in accordance with the prayer of the bill except interest was allowed only at the rate of 7% per annum from September 1, 1933, to August 30, 1935, and at the rate of 6% per annum thereafter. (R. 28.) Appellant accordingly brings this appeal, claiming error on the part of the District Court in failing to allow interest on the principal amount of the tax as claimed in the bill of complaint at 1% per month from September 1, 1933, to August 30, 1935.[1] Interest from and after the latter date is governed by Section 404 of the *Revenue Act of 1935,* which provides that the rate of interest from the date of enactment of the statute shall be 6% per annum.

Summary of Argument

The surety is primarily liable on an appeal bond executed pursuant to Section 603 of the *Revenue Act of 1928* from the date of acceptance thereof by the Board of Tax Appeals. The condition of the bond involved herein is such that the liability of the surety may only be extinguished by complying with its promise which is to

[1]Although not prayed for in this action, a strict interpretation of Sections 292 and 294(b) of the Revenue Act of 1928 would seem to provide for interest at 1% per month on the total deficiency inclusive of accrued interest for the reason that Section 292 provides that interest shall be added to and become part of the tax. Section 294(b) provides for interest on the "unpaid amount."

Specification of Errors to be Urged

The lower court erred in failing to allow interest on the principal sum of $13,380.40 at the statutory rate of 1% per month from September 1, 1933, the date of notice and demand upon the taxpayer for payment, to August 30, 1935, the effective date of the Revenue Act of 1935.

Alternatively, the lower court errer in allowing interest only at th rate of 7% per annum from September 1, 1933, to August 30, 1935, and not at the rate of 1% per month, according to the provisions of the applicable Federal statute.

pay the deficiency in tax found to be due, plus interest and additions thereto provided for by law. The purpose of the Federal statutes in requiring the bond is to insure the collection of the deficiency and the interest provided by Federal law. Hence, the interest on the deficiency referred to in the bond is that provided in the Federal statutes under the authority of which the bond was given and does not relate to the local rate in any particular state.

ARGUMENT

The Rate of Interest Is Controlled by the Federal Statute and Not by State Law

As stated by this Court in *United States v. Fidelity & Deposit Co. of Maryland,* 80 F. (2d) 24, 27: "A bond to pay taxes is a new obligation." The surety is primarily liable and no notice is necessary to fix liability under the bond. *United States v. Drielinger,* 21 F. (2) 211 (S. D. N. Y.)

The surety in the bond involved in the instant case became primarily liable from the date of the approval of the bond by the Board of Tax Appeals on December 15, 1931. This was a continuing liability, from which it could have been discharged by a decision overruling the determination of the Commissioner or by payment of the deficiency and interest by the taxpayer. The only other alternative which could have discharged the surety's continuing liability was payment according to the terms of the bond, namely, by paying the "deficiency as finally

determined, together with any interest, additional amounts or additions to the tax provided for by law."

This action was brought to enforce the promise contained in the bond. This Court in *United States v. Fidelity & Deposit Co. of Maryland, supra,* cited with approval the case of *United States v. Clark,* 3 F. Supp. 375 (W. D. Pa.), wherein the court held that the surety on a bond given to stay the collection of a tax was estopped to deny its validity.

That court in a subsequent hearing to fix the amount of judgment, decided April 24, 1933, not officially reported but found in 1933 C. C. H., Vol. 3, Par. 9297, amended its judgment to include interest at 1% per month in accordance with the provisions of Section 250(e) of the *Revenue Act of 1918* (clarified by Section 250(f) of the *Revenue Act of 1921).* The court said:

> "The surety, by its execution of the bond, incurred the same liability for payment of the taxes in question as existed on the part of the principal. The obligation was fixed by statute and the surety, by its bonds, undertook to meet that obligation in case of default by the principal. This is not a case of where interest is claimed as a mere incident to the recovery of a judgment for money due, *but is one where the recovery is upon an obligation to pay a debt, penalty and specific interest prescribed by statute."* (Italics supplied.)

That is the position of the Government in the instant case.

The obligation which defendant surety undertook to pay, namely, the deficiency and all interest provided for

by law, is measured by Section 292 and 294 of the *Revenue Act of 1928, infra.* Section 292 provides that the rate of interest on a deficiency assessment shall be 6% from the due date, in this case March 15, 1921 (R. 4), to the date of assessment, namely, August 26, 1933.

Notice and demand was made upon the taxpayer on September 1, 1933 (R. 8) for the payment of the deficiency assessment and interest. Payment was not made within ten days thereafter, by the virtue of which failure, interest became due and payable according to the provisions of Section 294(b), *infra,* at the rate of 1% per month from the demand upon the taxpayer on September 1, 1933, until August 30, 1935, the effective date of the *Revenue Act of 1935* (see Section 404 of the *Revenue Act of 1935, infra),* and thereafter at 6% until paid.

Defendant surety, by the clear and expressed terms of the bond, substituted its liability for that of the taxpayer and is answerable to the United States for the taxpayer's obligation which is, as stated above, to pay interest at 1% per month from the date of notice and demand on September 1, 1933, until August 30, 1935, and at 6% thereafter. This is certainly true at least up to the penal sum of the bond. By contracting to pay the deficiency, together with interest as provided for by law, the defendant surety did so with reference to the interest rate provided by the Federal statute and not with reference to the rate of interest prevailing in any particular State.

A petition to review the decision of the Board of Tax Appeals does not stay the collection of the deficiency. Section 603 of the *Revenue Act of 1928, infra.* The

Government relinquished the right to immediately proceed to collect the deficiency in exchange for the promise of defendant surety to pay the taxpayer's obligation. Its purpose is to insure the collection of the deficiency and interest thereon provided for by law. The bond in the instant case is the usual bond required by Section 1001(c) of the *Revenue Act of 1926,* as amended by Section 603 of the *Revenue Act of 1928,* of the taxpayer where an appeal is taken to the Circuit Court of Appeals from the decision of the Board of Tax Appeals. If such bonds do not obligate the parties signing them to interest fixed by the Federal statute, the clear intent of the statute is defeated.

It is to be noted that the bond in the instant case fails to specify a date for the payment of the obligation and it seems clear that the parties contracted with reference to the time fixed by the Federal statute for payment. It seems equally clear that the parties had in mind the rate of interest fixed by the same statute applicable in case of nonpayment. It is unlikely that the parties had in mind the date of payment fixed by the Federal statute and not the rate of interest fixed by the same statute applicable in case of failure to comply therewith.

It is submitted that the case of *United States v. John Barth Co.,* 279 U. S. 370, is controlling authority in the instant case and the facts therein are the same in principle except for the fact of assessment. In that case, after assessment was made, claims in abatement were filed and pursuant to the provisions of Section 234(a), subsection 14(a) of the *Revenue Act of 1918, infra,* a

bond with surety was given to secure payment of the tax finally determined to be due. That section, which is substantially the same as Section 250(e) of the same Act, provides that all tax found to be due shall, upon notice and demand, be paid with interest at 1% per month from the due date of the tax. The Court, in rendering judgment against the taxpayer and the surety in the suit on the bond, effectuated the intent of the statute by allowing interest not at the State rate but at the rate fixed by the Federal statute, said (p. 375):

> "The plain purpose of Paragraph 14(a) was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and *this with interest at the rate of 1% per month* from the time the tax would have been due, had no claim been filed. (Italics supplied.)

Thus when the bond in the instant case was given, there accrued to the Government an additional remedy for payment, namely, the promise of the surety and taxpayer under the bond to pay the deficiency and interest imposed thereon by the Federal statute which was in substitution of the right to sue the taxpayer for the tax.

The Government's contention herein was adopted in the case of *United States v. Maryland Casualty Co.,* 49 F. (2d) 556 (C. C. A. 7th), certiorari denied, 284 U. S. 645, cited by this Court in the case of *Hughson v. United States,* 59 F. (2d) 17. That court effectuated the intent

of Congress in a suit on a bond given, pending action on a claim in abatement by awarding judgment to include interest at 1% per month from the date the claim was decided until the tax was paid. See Section 250(e) of the 1918 Act, *infra*. It is to be noted that the section just cited provided that interest shall run not from the date of notice but from the date the claim was decided.

Furthermore, it is submitted that the decision of this Court in the *Hughson* case *supra,* is decisive of the law in the instant case. There the bond, executed pursuant to Section 279(a) of the *Revenue Act of 1924, infra,* was given to stay the collection of assessments pending final decision of claims in abatement. This Court, in holding that the Government was entitled to recover from the surety interest at 1% per month at least from the date of notice of the rejection of the claim for abatement and demand for payment to the surety, said (p. 19):

> "But the bonds in suit imposed a liability for the deficiency in tax plus all penalties and interest. The bonds were given on August 18, 1925, under the Revenue Act of 1924, which provides that, where an extension of time is given, interest runs on the defiency at 6 per cent. for the period of the extension and thereafter at 1 per cent. per month. Revenue Act 1924, § 274(g), 43 Stat. 298 (26 USCA § 1054 and note). The same rule applies to jeopardy assessments such as these made under section 276(a) (2) and section 274(d) of the Revenue Act of 1924; (26 USCA § 1056(a) (2), and § 1051 note); and section 279(a) of the Act (26 USCA § 1063 note) provides for interest at the rate of 1 per cent, per

month, if the amount included in the notice and demand is not paid within ten days after such notice and demand. The demand referred to is that made by the collector upon the taxpayer after the claim in abatement has been rejected in whole or in part. A similar provision occurred in the Revenue Act of 1926 and the Revenue Act of 1928. Sections 274(k), 276(a) (2), (b), and 279 (j), Revenue Act of 1926, 26 USCA §§ 1054 and note, 1056(a) (2), (b) and note, 1051 (j); sections 273 (f) and 294(a), (b), Revenue Act of 1928, 26 USCA §§ 2273(f), 2294(a), (b). The notice of the rejection of the claim for abatement and demand for the tax was made on the taxpayer on December 9, 1927, and on the bondsman July 14, 1928. The government was entitled to interest at 12 per cent. at least as soon as July 15, 1928. United States v. Maryland Casualty Co. (C. C. A.) 49 F. (2d) 556."

It is to be noted that the bond involved in the *Hughson* case, *supra,* was one given under the provisions of Section 279(a) of the 1924 Act, *infra,* which provided that interest shall run at 1% per month after notice and demand if not paid within ten days thereafter. This Court in the case just cited, ruled that the notice required was notice to the taxpayer. It may also be pointed out that the Government did not prosecute a cross appeal in that case, claiming interest at 1% per month from the date of notice to the taxpayer, and the language there used seems clearly to indicate an opinion that the rate provided by the Federal statute should apply from the date of notice to the taxpayer and not from the date of notice to the

surety for the reason that, the surety being primarily liable on the bond, notice to the taxpayer is only necessary according to the statute to start the running of interest at 1% per month.

The same requirement as to notice, not to fix the liability under the bond but to start the running of interest at 1% per month, applies to bonds given in connection with both jeopardy assessments and claims in abatement,[2] as will be seen by reference to the following sections, *infra:*

Sec. 250(e) of the Revenue	Act of	1918	(Claim in abatement)	
Sec. 250(e)	"	" 1921	"	"
Sec. 279(a), (b) and (c)	"	" 1924	"	"
Sec. 274(d)	"	" 1924	(Jeopardy assessment)	
Sec. 279(f), and (j)	"	" 1926	"	"
Sec. 273(f)	"	" 1928	"	"
Sec. 297	"	" 1928	"	"
Sec. 273(i)	"	" 1928	"	"

Thus, notice is required by the above sections, but it is only necessary to effect a change in the rate of interest from 6% per annum to 1% per month.

The court in *Maryland Casualty Co. v. United States,* 76 F. (2d) 626 (C. C. A. 5th), had before it a bond given to stay collection of the tax pending a claim in abatement. The court, we submit, erroneously held that the Government was only entitled to interest at the legal or state rate from the expiration of the period of the extension up to the penal sum of the bond and then only

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[2]The provisions relating to claims for abatement were omitted in the 1926 Act for the reason that the Board of Tax Appeals rendered the same unnecessary. See Section 279(a) of the 1924 Act, infra, which is substantially similar to Section 250(e) of the 1918 and 1921 Acts.

at the legal or statutory rate thereafter, providing notice is given to the surety. It is to be noted that the interest if allowed in that case at the statutory rate of 1% per month, when added to the principal, would exceed the penal sum of the bond. It seems apparent from the opinion that this fact influenced the court's opinion. See in this connection *United States v. Fidelity & Guaranty Co.,* 236 U. S. 512, 530.

The bond involved in the case of *Maryland Casualty Co. v. United States* (C. C. A. 7th), decided January 21, 1937, not officially reported but found in 1937 C. C. H., Vol. 3, Par. 9063, was given for an extension of time within which to pay the tax. The applicable statutes were Section 274(k) of the *Revenue Act of 1926* and Section 272(j) of the 1928 Act. The court approved the computation of interest on the principal amount of the tax at 6% from the date of demand on the taxpayer to the date of demand upon the surety and to this amount was added interest at 1% per month until the date that the principal and interest equalled the penal sum of the bond and thereafter at the legal rate of interest in Illinois. The authorities for this computation were stated to be *United States v. Maryland Casualty Co.,* 49 F. (2d) 556 (C.C.A. 7th), *supra,* and *Maryland Casualty Co. v. United States,* 76 F. (2d) 626 (C.C.A. 5th), *supra.* It is impossible to reconcile this ruling with that court's earlier holding in 49 F. (2d) 556, *supra,* for the reason that whereas the statute authorizing the acceptance of the abatement bond in 49 F. (2d) 556, *supra,* required notice to start the running of interest at the rate of 1% per month, the statute

authorizing the extension bond in the case decided January 21, 1937, *supra,* contains no requirement of notice as to the beginning of the 1% rate inasmuch as the rate at 1% per month applied prior to the beginning of the extension period and it was only by virtue of the acceptance of the extension bond and the duration of the period of the extension that it was reduced to ½% per month until expiration of the extension. As to extension bonds, see Section 250(f) of the 1921 Act, Section 274(g) of the 1926 Act, Section 274(k) of the 1926 Act, and Section 272(j) of the 1928 Act.

It is submitted that the decision in the case of *Maryland Casualty Co. v. United States,* 76 F. (2d) 626 (C.C.A. 5th), *supra,* and that decided January 21, 1937 by the Seventh Circuit, discussed above, are not in agreement with *United States v. John Barth Co., supra; Hughson v. United States, supra,* and *United States v. Maryland Casualty Co.,* 49 F. (2d) 556, *supra,* and *United States v. Clark, supra,* and therefore are not controlling authority in the instant case, and for the further reason that they leave unfulfilled the purpose of the Federal statute authorizing tax bonds, in failing to hold the surety to fulfill its promise under the bond, namely, to pay the taxpayer's obligation at least up to the penal sum of the bond.

Conclusion

The lower court erred in allowing interest at 7% per annum from September 1, 1933, to August 30, 1935. An order should be entered, requiring that the judgment be

modified and interest allowed for such period at the rate of 1% per month as provided by the Federal statute.

Respectfully submitted,

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MARCH, 1937

APPENDIX

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

DEDUCTIONS ALLOWED

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(14) (a) At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss * * * of the value of the inventory for such taxable year, * * *. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties * * * conditioned for the payment of any part of such tax found to be due, with interest. * * *

* * * *

PAYMENT OF TAXES

SEC. 250. * * *

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then * * * there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was

due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 250 (e) [This is substantially identical with Section 250(e) of the Revenue Act of 1918.]

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 274. * * *

(d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. * * * If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed * * * shall be paid upon notice and demand from the collector.

* * * *

CLAIMS IN ABATEMENT

SEC. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, * * *. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, * * * conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

* * * *

(c) If the claim in abatement is denied in whole or in part, there shall be collected, at the same time as the part of the claim denied, and as a part of the tax, interest at the rate of 6 per centum per annum upon the amount of the claim denied, from the date of notice and demand from the collector under subdivision (d) of section 274 to the date of the notice and demand * * *. If the amount included in the notice and demand from the collector * * * is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274 [As amended by Section 502 of the Revenue Act of 1928, c. 852, 45 Stat. 791]

(k) Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of 18 months, and, in exceptional cases, for a further period not in excess of 12 months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the

terms of the extension. In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

* * * *

JEOPARDY ASSESSMENTS

SEC. 279. * * *

(f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment * * * may obtain a stay of collection * * * by filing with the Collector a bond * * * not exceeding double the amount as to which the stay is desired, * * * conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in subdivision (j) of this section.

* * * *

(i) When the petition has been filed with the Board * * * [after] * * * a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall

be collected as part of the tax upon notice and demand * * *.

(j) * * * If the amount included in the notice and demand from the collector under subdivision (i) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month * * *.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 56. PAYMENT OF TAX.

(a) *Time of payment.*—The total amount of tax imposed by this title shall be paid on the fifteenth day of March following the close of the calendar year, * * *.

* * * *

SEC. 273. JEOPARDY ASSESSMENTS.

* * * *

(f) [Same as Sec. 279(j) of the Revenue Act of 1926.]

* * * *

(i) *Collection of unpaid amounts.*—[Same as Sec. 279(i) of the Revenue Act of 1926.]

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, * * *.

* * * *

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, * * * is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month from the date of such notice and demand until it is paid. * * *

* * * *

SEC. 297. INTEREST IN CASE OF JEOPARDY ASSESSMENTS,

[Same as Sec. 279(j) of the Revenue Act of 1926.]

SEC. 603. BOARD OF TAX APPEALS—COURT REVIEW OF DECISION.

Subdivisions (c) and (d) of section 1001 of the Revenue Act of 1926 are amended to read as follows:

"(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and

with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond * * *. (U.S.C., Title 26, Secs. 644, 645.)

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 404. INTEREST ON DELINQUENT TAXES.

Notwithstanding any provision of law to the contrary, interest accruing during any period of time after the date of the enactment of this Act upon any internal-revenue tax (including amounts assessed or collected as a part thereof) or customs duty, not paid when due, shall be at the rate of 6 per centum per annum.

No. 8476.

17.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ALMA I. WAGNER, Executrix of the Estate of Robert G. Wagner, Deceased, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Appellees.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 8476.

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Appellees.

Brief of Appellees Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, and United States Fidelity and Guaranty Company, a Corporation.

Preliminary Statement.

This brief is filed as the joint brief of the two appellees, Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, and the United States Fidelity and Guaranty Company.

Opinion Below.

There was no opinion by the Court below.

Jurisdiction.

This is an action at law, founded upon a contract and growing out of the laws of the United States providing for Internal Revenue [R. 4]. Judgment was entered in favor of appellant on October 1, 1936 [R. 27-31]. Petition for appeal was granted December 30, 1936 [R. 34], pursuant to the provisions of section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925. This appeal involves only that portion of the judgment providing for interest at the rate of 7% per annum from September 1, 1933 to August 30, 1935.

Question Presented.

Whether the principal and surety on an appeal bond executed pursuant to section 603 of the Revenue Act of 1928 are liable for interest at the rate prescribed by the Federal statute or at the legal rate prevailing in the State.

Statement.

Appellees are in accord with the statement contained in appellant's opening brief (App. Br. 2-4).

ARGUMENT.

Appellees agree with appellant's statement that a bond to pay taxes is a new obligation distinct from the tax liability underlying the bond.

United States v. Fidelity & Deposit Co. of Maryland, 80 Fed. (2nd) 24, 27;

United States v. John Barth Co., 279 U. S. 370, 73 L. Ed. 743.

The bond is a new contract obligation (*United States v. John Barth Co., supra*) and as such is subject to the same rules of interpretation and enforcement as any other contract.

One of the fundamental rules of interpreting contracts is that they must be interpreted according to the law of the place where it is to be performed, or if no place of performance be indicated, then according to the law of the place where it is made.

California Civil Code, Sec. 1646;

Platna v. Vincent, 194 Cal. 436; 229 Pac. 24;

Blachman etc. Bank v. Kitcham, 36 Cal. App. 284, 171 Pac. 1084.

Hence the courts must read as a part of a contract the laws of the state existing at the time it was made.

Allen v. Allen, 95 Cal. 184, 30 Pac. 213;

Wemrich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667.

Thus the law of California, the place where the contract was made [R. 13] and to be performed [R. 4] must be read as a part of the bond.

Until the United States Collector of Internal Revenue made demand for the payment of the tax deficiency, the bond was nothing more than an executory contract. After the demand, to-wit: September 1, 1933, the obligation of appellees on the bond became fixed and the failure of appellees to comply with demand was a failure to perform the bond contract, giving to the United States of America a cause of action against appellees for damages on the contract bond and not for the tax.

Damages for failure to perform a contract to pay money, under the California law, is the principal amount of the contract, with interest thereon from the date of the said failure to perform to date of a judgment or date of payment.

California Civil Code, Sec. 3302.

As above stated, the bond was to be performed and was made in California. The appellee, Alma I. Wagner, etc., resided in Los Angeles, California [R. 4] and the appellee, United States Fidelity and Guaranty Company, was authorized to do and was doing business in California [R. 4] and the bond was executed in Los Angeles, California [R. 13]. Taxes are paid by a taxpayer to the Collector of Internal Revenue in and for the district in which the taxpayer resides. The judgment rendered herein in the Court below, together with interest on the judgment to date of payment, was paid to the Collector in Los Angeles, California.

Revenue Act of 1926, Secs. 227, 270;

Revenue Act of 1932, Secs. 53, 56;

Revenue Act of 1936, Secs. 53, 56.

The contract bond was therefore subject to the laws of the State of California and the legal rate of interest chargeable in California attached after the failure to perform the contract by appellees.

The legal rate of interest in California is seven per cent (7%):

> *Deerings Gen. Laws, 1931* (Vol. 2) Act 3757;
> *Constitution of California,* Sec. 22, Art. XX.

This was undoubtedly the Court's reasoning in the case of *Maryland Casualty Co. v. United States,* 76 Fed. (2d) 626, wherein the Court held that the interest from and after the date of demand accrued at the State rate of interest, the Court saying:

> "According to these cases, the present suit is not one to collect taxes, but to enforce the covenant of the bond."

And further the Court says:

> "The suit is technically not one for taxes. The surety has not promised to pay them, but to pay $4,000.00 if Lindsay did not on May 26, 1928, pay his taxes. The penalty in a bond like this is no longer a forfeited 'pound of flesh', but the law follows equity in treating it as security for the performance of the conditions and will exact only enough of it to recompense the obligee for the breach of the condition.",

which is but another way of saying that the government is entitled to its damages for the failure to perform the contract, which as has been shown above, is interest in accordance with the State law.

Conclusion.

For these reasons, we respectfully submit that the lower Court was correct in applying the state interest rate and that therefore the judgment should be affirmed. Appellees promptly made payment in full of the judgment as rendered, together with interest accrued thereon to date of payment and their obligation as thus discharged should not be disturbed.

Respectfully submitted,

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